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In The Supreme Court of the United States

TIMOTHY SCOTT, A COWETA COUNTY, GEORGIA, DEPUTY,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

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United States District Court for the Northern District of Georgia Case Number 3:01-cv-00148-WBH

* * *

10/21/2002 Statement of Undisputed Facts in Support of Defendants' Motion for Summary Judgment Filed by Attorney for Defendant/Petitioner

* * *

11/14/2002 Plaintiff's Statement of Material Facts Pursuant to N.D. Local Rule 56 Filed by Attorney for Plaintiff/Respondent

* * *

09/25/2003 Unpublished order denying in part and granting in part defendants' motion for summary judgment

United States Court of Appeals
for the Eleventh Circuit
No. 03-15094-HH

* * *

12/23/2005 Rehearing Opinion – reversed in part; affirmed in part

* * *

02/17/2006 Order denying petition for rehearing and petition for rehearing en banc

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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

VICTOR HARRIS, Plaintiff, v. COWETA COUNTY, GEORGIA; SHERIFF MICHAEL S. YEAGER; SGT. MARK FENNINGER; DEPUTY CLINTON D. REYNOLDS, and DEPUTY TIMOTHY C. "CHUCK" SCOTT, Defendants.	CIVIL ACTION FILE NO.3:O1-CV-148-WBH

STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 21, 2002)

COME NOW defendants and, pursuant to Local Rule 56.1(B)(1), file this Statement of Undisputed Facts in Support of their Motion for Summary Judgment.

1.

At approximately 10:42 p.m. on March 29, 2001, Deputy Clinton Reynolds of the Coweta County Sheriff's Office was stationed on Highway 34 when he detected a vehicle traveling 73 miles per hour in a 55 mile per hour zone. (Depo. of Reynolds, pp. 72-73 and 75). Reynolds flashed his blue lights, but the vehicle would not slow down; instead, it picked up speed. (Depo. of Reynolds, pp.

73 and 76). At that point, Reynolds decided to initiate a pursuit to investigate the vehicle's refusal to slow down. (Depo. of Reynolds, p. 76).

2.

Under the vehicle pursuit policy of Coweta County Sheriff's Office that was in effect, decisions regarding the initiation, continuation and termination of pursuits were left to the discretion of the officer and supervisor in the field. (Depo. of Alpert, p. 54; Depo. of Sheriff Yeager, Exhibit 3, Coweta County Sheriff's Office Policies and Procedures Manual, pp. 92-94). Plaintiff's expert agrees that this "judgmental policy" is the majority policy for law enforcement agencies in the country. (Depo. of Alpert, p. 54). Plaintiff's expert further agrees that the deputies involved in the pursuit had the legal authority to stop the suspect. (Depo. of Alpert, pp. 72-73).

3.

In any event, after flashing lights failed to stop the vehicle, Reynolds caught up to the vehicle just past Sullivan Road and turned on his lights and siren, which activated his video camera. (Depo. of Reynolds, pp. 77-79; Video recording of the pursuit filed contemporaneously with Defendants' Memorandum in support of Motion for Summary Judgment as Exhibit A,[1] 78-22:42:00). Unbeknownst to Reynolds at the time, the vehicle was driven by Victor Harris, who had been arrested earlier that day,

[1] References to the video recording from the vehicles of Reynolds and Scott are denoted by vehicle number – No. 78 for Reynolds and No. 66 for Scott – and time as reflected on the video counter.

knew he was being pursued and was determined nevertheless not to be captured. (Depo. of Harris, pp. 84-85, 103 and 111). As Harris himself explained during this deposition, he was determined not to stop because he thought he could get away and, in any event, did not want to incur an impound fee for his car if it had to be towed from the scene of his arrest. (Depo. of Harris, pp. 104-06 and 111).

4.

Harris first headed eastbound toward Peachtree City at speeds in excess of 100 miles per hour, and passing vehicles on double yellow traffic control lines. (Exhibit A, 78-22:42:48; 78-22:44:09; Depo. of Reynolds, p. 50, Exhibit 6, "Incident Report"). He even ran through a red light at the intersection of Highway 34 and Fisher Road by passing several vehicles in the turning lane that were stopped at the light. (Exhibit A, 78-22:44:36; Depo. of Reynolds, p. 50, Exhibit 6, "Incident Report").

5.

Meanwhile, Reynolds radioed dispatch and reported that he was pursuing a fleeing vehicle. (Depo. of Reynolds, p. 81; Depo. of Scott, p. 115). Deputy Chuck Scott heard Reynolds' radio communication and joined the pursuit to provide backup for his partner, as the pursuit proceeded toward the county line and into Fayette County. (Exhibit A, 66-22:43:01; Depo. of Reynolds, p. 82; Depo. of Scott, p. 118).

6.

Pursuant to their training, once Scott joined the pursuit, he began to call out the location of the pursuit on the radio to allow Reynolds, as the lead vehicle, to concentrate on his driving and the pursuit of Harris. (Exhibit A, 78-22:44:53; Depo. of Reynolds, p. 82). Reynolds, Scott and their supervisor Sgt. Mark Fenninger, along with all the other deputies in the Sheriff's Office, were operating pursuant to the training they had each received in compliance with Georgia law as set by the requirements of the Georgia Peace Officer Standards and Training Council (P.O.S.T.). (Depo. of Sheriff Yeager, pp. 67-68; Depo. of Alpert, p. 142; Depo. of Scott, Exhibit 2, P.O.S.T. records; Depo. of Reynolds, Exhibit 1, P.O.S.T. records; Depo. of Fenninger, Exhibit 1, P.O.S.T. records). Sheriff Michael Yeager also required his deputies to have an additional twenty (20) hours of training per year *beyond* the state requirements. (Depo. of Sheriff Yeager, p. 78).

7.

As the pursuit headed towards Peachtree City, Harris continued to pass vehicles on double yellow traffic control lines at a high rate of speed. (Exhibit A, 78-22:45:26; 78-22:45:28; 78-22:45:32; 78-22:45:37; and 78-22:45:43). After the pursuit crossed into Peachtree City, Harris turned into a drugstore parking lot located in a shopping complex. (Exhibit A, 78-22:46:02; Depo. of Reynolds, p. 87). At this point, two Peachtree City police vehicles were in the parking lot and one of the officers (Sgt. Mark Brown) joined in. (Depo. of Reynolds, p. 87; Depo. of Brown, pp. 8 and 14). Reynolds followed Harris as he weaved through the shopping complex towards Highway 74, while Scott proceeded around the opposite side of the complex to block

Harris' exit onto Highway 74. (Exhibit A, 66-22:46:39; 66-22:46:39; Depo. of Reynolds, pp. 87-88 and 91-92; Depo. of Scott, pp. 171-73).

8.

Scott attempted to block the exit as he entered the shopping complex from Highway 74. (Exhibit A, 66-22:46:57; Depo. of Scott, p. 175). Although Harris was "boxed-in" by three law enforcement vehicles (Depo. of Harris, p. 103), he crashed into Scott's vehicle and thereby escaped back onto Highway 74. (Exhibit A, 78-22:46:20; 78-22:46:23; and 66-22:46:57).

9.

As the pursuit entered Highway 74, Sgt. Brown ordered his fellow Peachtree City officers to block intersections from cross-traffic. (Depo. of Brown, p. 13). Officer Jason Ercole of the Peachtree City police also joined in the pursuit, but followed from a distance. (Exhibit A, 78-22:46:30; Depo. of Brown, pp. 14-15; Depo. of Ercole, pp. 8-10 and 22-23).

10.

Despite being pursued by four law enforcement officers from two separate jurisdictions, Harris proceeded south on Highway 74, once again at speeds approximating 90 to 100 miles per hour. (Depo. of Reynolds, p. 112 and Exhibit 6, "Incident Report"). He continued to pass vehicles while crossing the double yellow traffic control lines, and raced through more intersections, including a red light. (Exhibit A, 66-22:47:49; 78-22:46:56; 66-22:47:55; 66-22:48:28).

11.

Given Harris' reckless actions and the clear danger posed to the public, the deputies determined that the pursuit needed to be brought to an end as soon as practicable. (Depo. of Reynolds, p. 114; Depo. of Scott, pp. 186-187; Depo. of Fenninger, pp. 54-56 and Exhibit 4, "Supplement Report," and Exhibit 5, "Incident Report"). Scott therefore requested and obtained approval from his supervisor, Sgt. Mark Fenninger – as required by his training and the pursuit policy – to make physical contact with the vehicle in what is termed a "PIT" maneuver. (Exhibit A, 79-22:47:35; Depo. of Scott, pp. 143-44; Depo. of Fenninger, p. 53; Depo. of Sheriff Yeager, Exhibit 3, Coweta County Sheriff's Office Policies and Procedures Manual, p. 93).

12.

Prior to the authorization, Fenninger was advised that Reynolds and Scott had pursued Harris into the parking lot of a shopping complex, and that Harris had hit Scott's vehicle to effectuate his escape. (Depo. of Fenninger, pp. 38, 46 and 54-55). When Harris entered the commercial area of the shopping complex, Fenninger's concern was for the safety of pedestrians. (Depo. of Fenninger, pp.38-39). Once he was advised that Harris had struck Scott's vehicle, he authorized the PIT maneuver to get Harris stopped. (Depo. of Fenninger, pp. 54-55). Fenninger maintained radio contact with the deputies while on his way to the pursuit location. (Depo. of Fenninger, pp. 35 and 46).

13.

Since Scott's vehicle was already damaged from the impact at the shopping complex, Scott assumed the lead

position and approached the vehicle to perform the PIT maneuver. (Exhibit A, 66-22:47:21; 66-22:48:39). Due to the high rate of speed, Scott was unable to perform the PIT maneuver. Instead, he slowed his vehicle and tapped the rear bumper of Harris' vehicle. (Depo. of Scott, pp. 146-47). Scott decided to make direct contact with his push bumper, while no other motorist were in the area. (Depo. of Scott, p. 147). Harris' vehicle then left the roadway and crashed. (Exhibit A, 66-22:48:47).

14.

The entire pursuit covered approximately nine miles, and lasted approximately six (6) minutes. (Exhibit A; Depo. of Reynolds, p. 78). Although Harris has been rendered a quadriplegic, (Depo. of Harris, pp. 166-68), he fortunately survived, and no officer or third-parties were injured along the way as a result of his recklessness.

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THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

VICTOR HARRIS,	
Plaintiff,	
v.	
COWETA COUNTY, GEORGIA; SHERIFF MICHAEL S. YEAGER; SGT. MARK FENNINGER; DEPUTY CLINTON D. REYNOLDS, and DEPUTY TIMOTHY C. "CHUCK" SCOTT,	**CIVIL ACTION FILE NO. 3:01-CV-148-WBH**
Defendants.	

PLAINTIFF'S STATEMENT OF MATERIAL FACTS PURSUANT TO N.D. LOCAL RULE 56

COMES NOW the Plaintiff, by and through his attorneys of record, and hereby responds to the Defendants' Statement of Material Facts (Part I) and hereby files Plaintiff's Statement of Material Facts As to Which There is a Genuine Issue to be Tried (Part II), showing the Court as follows:

I. PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

OBJECTION: Defendants' Statement of Undisputed Facts in Support of Motion for Summary Judgment fails to comply with Local Rule 56.1(B)(1) by failing to set forth separately enumerated facts which the Defendants contend are undisputed. Instead, the Defendants set forth

14 paragraphs of "facts" which contain numerous sentences. In order to fully and accurately respond to these paragraphs, the Plaintiff finds it necessary to respond to each sentence one at a time. Although Defendants' noncompliance with the Local Rules makes the Plaintiffs response to the Defendants' statement more difficult, Plaintiff has responded to the best of his ability. The following is the Plaintiffs response to the enumerated paragraphs of Defendants' statement of allegedly undisputed facts:

1.

At approximately 10:42 p.m. on March 29, 2001, Deputy Clinton Reynolds of the Coweta County Sheriff's Office was stationed on Highway 34 when he detected a vehicle traveling 73 miles per hour in a 55 mile per hour zone. (Depo. of Reynolds, pp. 72-73 and 75). Reynolds flashed his blue lights, but the vehicle would not slow down; instead, it picked up speed. (Depo. of Reynolds depo., pp. 73 and 76). At that point, Reynolds decided to initiate a pursuit to investigate the vehicle's refusal to slow down. (Depo. of Reynolds, p. 76).

RESPONSE: The Plaintiff admits that Defendant Reynolds has testified that he was stationed on Highway 34 when he alleges he clocked the Plaintiff's vehicle traveling at 73 m.p.h. in a 55 m.p.h. zone. (Reynolds depo. at 72-73, 75). The Plaintiff further admits that Reynolds flashed his blue lights to attempt to get the Plaintiff's vehicle to slow down. (*Id.* at 73, 75). Plaintiff admits that Reynolds testified that the Plaintiff's vehicle did not slow down in response to the blue lights. (*Id.* at 77). However, the Plaintiff denies that he increased his speed after

seeing the blue lights. Pursuant to Reynolds' testimony, Reynolds testifies: 1) that he clocked the Plaintiffs vehicle using his rear antennae (*Id.* at 73); 2) when the Plaintiff's vehicle passed, he switched his radar to the front antennae and the Plaintiffs vehicle "was still doing seventy three miles per hour" (*Id.* at 73); 3) Reynolds' radar was set in the stationary mode which would not register a speed reading once Reynolds' police vehicle started moving (*Id.* at 73-74); and 4) Reynolds never switched his radar from stationary to moving which would have provided the numerical value of any increase of speed in the Plaintiff's vehicle. (*Id.* at 74).

The Plaintiff further admits that Defendant Reynolds made a decision to pursue the Plaintiffs vehicle solely on the basis of a traffic violation – speeding 73 m.p.h. in a 55 m.p.h. zone. (*Id.* at 76).

2.

Under the vehicle pursuit policy of Coweta County Sheriffs Office that was in effect, decisions regarding the initiation, continuation and termination of pursuits were left to the discretion of the officer and supervisor in the field. (Depo. of Alpert, p. 54; Depo. of Sheriff Yeager, Exhibit 3, Coweta County Sheriffs Office Policies and Procedures Manual, pp. 92-94). Plaintiffs expert agrees that this "judgmental policy" is the majority policy for law enforcement agencies in the country. (Depo. of Alpert, p. 54). Plaintiffs expert further agrees that the deputies involved in the pursuit had the legal authority to stop the suspect. (Depo. of Alpert, pp. 72-73).

RESPONSE: The Plaintiff admits that under the CCSD Pursuit Policy, decisions to initiate, continue or

terminate a pursuit were vested solely to the discretion of pursuing officer within the guidelines set forth in the Pursuit Policy. (Scott depo. at Ex. 11). Specifically, the CCSD Pursuit Policy states that: 1) "the pursuing deputy should keep in mind his personal safety and try everything within his authority to apprehend the violator without resorting to a high speed chase" (*Id.* at 93); 2) a "pursuit will be discontinued: (a) upon weighing the pertinent factors, the gravity of the offense and the prospect of losing the suspect will not balance with the hazards to the Deputy and the public; (e) upon receipt of additional information once the pursuit begun [sic] that would allow later apprehension and successful prosecution." (*Id.* at 93-94).

In the case *sub judice*, the vehicle that the Plaintiff was driving was registered in his name and at his proper address. (Accident report attached hereto as Exhibit "A"; Harris depo. at 10). Based on the CCSD Pursuit Policy, the Plaintiff submits that Reynolds violated his policy by failing to discontinue the pursuit because the offense was speeding and Reynolds had the tag number of the vehicle which would have made apprehension and prosecution at a later date probable. (Alpert Aff., Alpert Expert Rep. at 11-12; Reynolds depo. at 81-83).

The Plaintiff further admits that under the CCSD Pursuit Policy, a supervisor had the authority and duty to terminate a pursuit when the need for immediate apprehension of the suspect to the public outweighed the dangers of the pursuit. (Scott depo. at Ex. 11). The Plaintiff further submits that Fenninger was Scott [sic] supervisor who was supposed to be supervising the pursuit. (Fenninger depo. at 37). Further, the purpose of supervising an officer during the course of a pursuit is to ensure that the

pursuing officer, who is filled with adrenalin, does not make bad decisions. (Fenninger depo. at 48-50).

The Plaintiff admits that Plaintiff's expert had testified that the majority of departments in the country had judgmental policies. (Alpert depo. at 54). However, Plaintiffs expert further testified that any department which maintains a judgmental policy had an affirmative duty to provide it officers with significant training on the decision-making aspects of pursuits, because a policy which gives wide latitude to officers requires a higher level of training to make sure that officers make the proper decisions. (Alpert Aff., Expert Rep. at 9-10, 12; Alpert depo. at 54-55) By comparison, the Peachtree City Police Department had a restrictive policy, not a judgmental policy, which would have prohibited the pursuit of the Plaintiff. (Brown depo. at 42-43; Ercole depo. at 15, 17-18; Murray depo. at Ex. 6). Chief Murray of the Peachtree City Police Department wrote a letter to the Governor of the State of Georgia requesting that all pursuit policies be restricted by the state if police departments fail to voluntarily restrict or enforce their pursuit policies. (Murray depo. at Ex. 7). The CCSD changed its policy to a restrictive one after this incident and had been working on updating its policies since 1997-1998. (Yeager depo. at 13-15).

The CCSD failed to provide its officers with any training on high-speed pursuits. (Alpert Aff., Expert Rep. at 9-10; Yeager depo. at 35-36; Fenninger depo. at 9; Scott depo. at 16-18, 128-130; Reynolds depo. at 17, 29, 37, 46-47). Further, the CCSD failed to even ensure that its officers, including Reynolds, Scott and Fenninger, read and understood the CCSD Pursuit Policy. (Yeager depo. at 77).

The Plaintiff admits that the Defendants had the legal authority to initiate a traffic stop of the Plaintiff for speeding.

3.

In any event, after flashing lights failed to stop the vehicle, Reynolds caught up to the vehicle just past Sullivan Road and turned on his lights and siren, which activated his video camera. (Depo. of Reynolds, pp. 77-79; Video recording of the pursuit filed contemporaneously with Defendants' Memorandum in support of Motion for Summary Judgment as Exhibit A[1], 78-22:42:00). Unbeknownst to Reynolds at the time, the vehicle was driven by Victor Harris, who had been arrested earlier that day, knew he was being pursued and was determined nevertheless not to be captured. (Depo of Harris, pp. 84-85, 103 and 111). As Harris himself explained during this deposition, he was determined not to stop because he thought he could get away and, in any event, did not want to incur an impound fee for his car if it had to be towed from the scene of his arrest. (Depo. of Harris, pp. 104-06 and 111).

RESPONSE: The Plaintiff admits that Defendant Reynolds initiated a pursuit of the Plaintiff and his dash-mounted video camera activated at some point thereafter. (Reynolds depo. at 77-70; Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment).

The Plaintiff denies that Reynolds did not know the identity of the driver of the Plaintiff's vehicle. In fact, the

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[1] References to the video recording from the vehicles of Reynolds and Scott are denoted by vehicle number – No. 78 for Reynolds and No. 66 for Scott – and time as reflected on the video counter.

Plaintiff submits that immediately after engaging in the pursuit of the Plaintiff, Reynolds called in the tag number of the vehicle being driven the Plaintiff which was registered in the Plaintiff's name at the Plaintiff's proper address. (Reynolds depo. at 81-83).

The Plaintiff admits that Reynolds did not know that the Plaintiff had been arrested earlier that day and, therefore, this fact is neither relevant or material. The Plaintiff denies that he was determined not to be captured, but was running because he was scared and attempting to drive home to avoid having his car impounded or towed. (Harris depo. at 104-05, 107-08).

4.

Harris first headed eastbound toward Peachtree City at speeds in excess of 100 miles per hour, and passing vehicles on double yellow traffic control lines. (Exhibit A, 78-22:42:48; 78-22:44:09; Depo. of Reynolds, p.50, Exhibit 6, "Incident Report"). He even ran through a red light at the intersection of Highway 34 and Fisher Road by passing several vehicles in the turning lane that were stopped at the light. (Exhibit A, 78-22:44:36; Depo. of Reynolds, p. 50, Exhibit 6, "Incident Report").

RESPONSE: The Plaintiff admits that he drove his vehicle towards Peachtree City which is also towards the Plaintiff's home. The Plaintiff admits that during the course of the pursuit, he passed vehicles on a double yellow line in violation of the traffic statutes. However, the Plaintiff would state that at least eight times during the pursuit, he utilized his blinkers while passing or making turning movements. Further, the Plaintiff would state that at no time during the course of the pursuit did he

intentionally use his vehicle as a weapon or strike another motorist. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff admits that he ran a red light at the intersection of Highway 34 and Fisher Road. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). Further, the Plaintiff submits that he slowed for the intersection of 74 and Kelly or Crosstown Drive. (Ercole depo. at 25-26). Plaintiff admits that he was speeding but denies that he drove in excess of 100 miles per hour. (Videotapes attached as Exhibit "A" to Defendant's Motion for Summary Judgment and Exhibit "D" hereto)

5.

Meanwhile, Reynolds radioed dispatch and reported that he was pursuing a fleeing vehicle. (Depo. of Reynolds, p. 81; Depo. of Scott, p.115). Deputy Chuck Scott heard Reynolds' radio communication and joined the pursuit to provide backup for his partner, as the pursuit proceeded toward the county line and into Fayette County. (Exhibit A, 66-22:43:01; Depo of Reynolds, p. 82; Depo. of Scott, p.118).

RESPONSE: The Plaintiff submits that Reynolds radioed his dispatcher and reported he was involved in a pursuit at the beginning of the pursuit. (Reynolds depo. at 81-83). Further, the Plaintiff submits that Reynolds broadcast the license plate number of the Plaintiff's vehicle over the radio which would make apprehension at a later time possible without the necessity of a high-speed pursuit. *Id.* Further, Plaintiff submits that the Reynolds never broadcast over the radio the underlying charge which precipitated the pursuit (which was speeding) and neither

Scott nor Fenninger knew the underlying basis for the pursuit. (Scott depo. at 116-117, 159-160; Fenninger depo. at 34-37). Further, Reynolds never informed the Peachtree City Police Department that they were pursuing a suspect into their jurisdiction (out of Reynolds' jurisdiction) or the underlying basis for the pursuit. (Brown depo. at 11-12). The Plaintiff admits that Scott unilaterally decided to assist Reynolds in his pursuit of the Plaintiff. (Reynolds depo. at 82; Scott depo. at 118). For further response, the Plaintiff would state that Scott was not requested to join the pursuit and made the decision to join the pursuit without determining the underlying reason for the pursuit. (Scott depo. at 116-118, 159-160; Reynolds depo. at 82). The Plaintiff further submits that in Scott's overzealousness to join the pursuit, it appears that he drove his patrol car at speeds well over 100 m.p.h. (Videotapes attached as Exhibit "A" to the Defendants' Motion for Summary Judgment)

6.

Pursuant to their training, once Scott joined the pursuit, he began to call out the location of the pursuit on the radio to allow Reynolds, as the lead vehicle, to concentrate on his driving and the pursuit of Harris. (Exhibit A, 78-22:44:53; Depo of Reynolds, p.82). Reynolds, Scott and their supervisor Sgt. Mark Fenninger, along with all the other deputies in the Sheriffs Office, were operating pursuant to the training they had each received in compliance with Georgia law as set by the requirements of the Georgia Peace Officer Standards and Training Council (P.O.S.T.). (Depo of Sheriff Yeager, pp. 67-68; Depo. of Alpert, p.142; Depo. of Scott, Exhibit 2, P.O.S.T. records; Depo. of Reynolds, Exhibit 1, P.O.S.T records; Depo of

Fenninger, Exhibit 1, P.O.S.T. records). Sheriff Michael Yeager also required his deputies to have an additional twenty (20) hours of training per year *beyond* the state requirements. (Depo. of Sheriff Yeager, p. 78).

RESPONSE: The Plaintiff denies that Scott, Reynolds or Fenninger had any high-speed pursuit training. (Alpert Aff., Expert Rep. at 9-10; Yeager depo. at 35-36; Fenninger depo. at 9; Scott depo. at 16-18, 128-130; Reynolds depo. at 17, 29, 37, 46-47). Further, the CCSD failed to even ensure that its officers, including Reynolds, Scott and Fenninger, read and understood the CCSD Pursuit Policy. (Yeager depo. at 77). As the Defendants failed to have any high-speed pursuit training, the Plaintiff denies that any actions taking by the officers was pursuant to their training.

The Plaintiff admits that Scott took over the radio communications once he caught up to the pursuit. (Videotapes attached as Exhibit "A" to the Defendants' Motion for Summary Judgment).

The Plaintiff admits that Sheriff Yeager required his officers to have an additional 20 hours of training beyond the state requirements. However, the Plaintiff denies that Sheriff Yeager provided his officers, including Scott and Reynolds, **any training whatsoever** on high-speed pursuits or deadly force applications during the course of high-speed pursuits. (Alpert Aff., Expert Rep. at 9-10; Yeager depo. at 35-36; Fenninger depo. at 9; Scott depo. at 16-18, 128-130; Reynolds depo. at 17, 29, 37, 46-47). Significantly, Sheriff Yeager provided no training to his officers on high-speed pursuits and deadly force applications despite admitting that there was an obvious need to

train officers on high-speed pursuits and deadly force applications. (Yeager depo. at 32-34).

7.

As the pursuit headed towards Peachtree City, Harris continued to pass vehicles on double yellow traffic control lines at a high rate of speed. (Exhibit A, 78-22:45:26; 78-22:45:28; 78-22:45:32; 78-22:45:37; and 78:22:45:43). After the pursuit crossed into Peachtree City, Harris turned into a drugstore parking lot located in a shopping complex. (Exhibit A, 78-22:46:02; Depo. of Reynolds, p. 87). At this point, two Peachtree City police vehicles were in the parking lot and one of the officers (Sgt. Mark Brown) joined in. (Depo. of Reynolds, p. 87; Depo. of Brown, pp. 8 and 14). Reynolds followed Harris as he weaved through the shopping complex towards Highway 74, while Scott proceeded around the opposite side of the complex to block Harris' exit onto Highway 74. (Exhibit A, 66-22:46:39; 66-22:46:39; Depo. of Reynolds, pp. 87-88 and 91-92; Depo. of Scott, pp. 171-73).

RESPONSE: The Plaintiff admits that during the course of the pursuit, he passed vehicles on a double yellow line in violation of the traffic statutes. However, the Plaintiff would state that at least eight times during the pursuit, he utilized his blinkers while passing or making turning movements. Further, the Plaintiff would state that at no time during the course of the pursuit did he intentionally use his vehicle as a weapon or strike another motorist. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). Further, the Plaintiff submits that he slowed for the intersection of 74 and Kelly or Crosstown Drive. (Ercole depo. at 25-26).

The Plaintiff submits that once he entered into Peachtree City, the Plaintiff slowed his vehicle, turned on his blinker and entered into a drug store parking lot. (Videotapes attached as Ex. "A" to Defendants' Motion for Summary Judgment).

The Plaintiff admits that when he turned into the parking lot, there were two Peachtree City officers in the parking lot. (Mark Brown depo. at 7). However, the Plaintiff denies that Sgt. Mark Brown of the PCPD joined in the pursuit. (*Id.* at 14-16). Sgt. Brown did not know the reason for the pursuit and, therefore, did not join the pursuit. *Id.* Instead, Sgt. Brown followed the pursuit route to broadcast information about the pursuit to his fellow officers to assist in stopping traffic at intersections on the pursuit route. (*Id.* at 14-16, 19-20). Further, Sgt. Brown testified that a pursuit for a speeding violation would be in violation of the Peachtree City Police Department Pursuit Policy which only allows pursuits for violent felonies. (*Id.* at 42-43; Murray depo. at Ex. 6).

The Plaintiff admits that Reynolds followed the Plaintiff into the parking lot. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff denies that he "weaved" through the parking lot. The Plaintiff admits that he drove on a private roadway through the parking lot and around a traffic circle or turnabout. *Id.* The Plaintiff further submits that Defendant Scott was traveling too fast to make the turn into the parking lot. (Reynolds depo. at Ex. 6). After missing the entrance to the parking lot, Defendant Scott drove his vehicle around the parking lot and attempted to block the Plaintiff from exiting onto Highway 74 by driving his vehicle directly into the path of the Plaintiff's vehicle. (Videotapes attached as Exhibit "A" to Defendants'

Motion for Summary Judgment; Reynolds depo. at 91, 97 and Ex. 6; Scott depo. at 175 and Ex. 1).

8.

Scott attempted to block the exit as he entered the shopping complex from Highway 74. (Exhibit A, 66-22:46:57; Depo. of Scott, p.175). Although Harris was "boxed-in" by three law enforcement vehicles (Depo. of Harris, p. 103), he crashed into Scott's vehicle and thereby escaped back onto Highway 74. (Exhibit A, 78-22:46:20; 78-22:46:23; and 66-22:46:57).

RESPONSE: The Plaintiff admits that Scott attempted to block the exit to the parking lot by driving his patrol car directly into the Plaintiff's lane of traffic. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Reynolds depo. at 91, 97 and Ex. 6; Scott depo. at 175 and Ex. 1).

The Plaintiff denies that he was boxed in by three law enforcement vehicles as Sgt. Brown did not participate in any attempt to stop the Plaintiff. (Brown depo. at 14-16, 19-20). The Plaintiff admits that Scott attempted to block the exit by driving his vehicle directly into the Plaintiff's lane of traffic, with Reynolds in pursuit of the Plaintiff from behind. (Videotapes attached as an Exhibit "A" to Defendants' Motion for Summary Judgment; Reynolds depo. at 91, 97, and Ex. 6; Scott depo. at 175 and Ex. 1).

The Plaintiff admits that contact was made between the Plaintiff's vehicle and Scott police vehicle. The Plaintiff denies that "he crashed" into Scott's vehicle. The Plaintiff would state that the videotape clearly indicates

that: 1) Scott drove his vehicle directly into the Plaintiff's lane of traffic; 2) Plaintiff attempted to turn his vehicle to the left to avoid contact with Scott's vehicle; 3) Scott turned his police vehicle to the right in an effort to "box in" and/or stop the Plaintiff; and 4) minor contact occurred between the Plaintiff's vehicle and Scott's police vehicle. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Reynolds depo. at 91, 97 and Ex. 6; Scott depo. at 175 and Ex. 1).

9.

As the pursuit entered Highway 74, Sgt. Brown ordered his fellow Peachtree City officers to block intersections from cross-traffic (Depo. of Brown, p. 13). Officer Jason Ercole of the Peachtree City police also joined in the pursuit, but followed from a distance. (Exhibit A, 78-22:46:30; Depo. of Brown, pp. 14-15; Depo. of Ercole, pp. 8-10 and 22-23).

RESPONSE: The Plaintiff admits that Sgt. Brown ordered his fellow Peachtree City officers to block intersections on the pursuit route. (Brown depo. at 13, 14-16, 19-20).

The Plaintiff denies that Officer Ercole joined the pursuit as a pursuing officer. (Murray depo. at 13; Brown depo. at 14; Ercole depo. at 8-10, 22-23). The Plaintiff admits that Sgt. Brown and Officer Ercole of the PCPD followed the pursuit at a distance in an effort to clear the intersections on the pursuit path. (Brown depo. at 13-16).

10.

Despite being pursued by four law enforcement officers from two separate jurisdictions, Harris proceeded south on Highway 74, once again at speeds approximating 90 to 100 miles per hour. (Depo. of Reynolds, p. 112 and Exhibit 6, "Incident Report"). He continued to pass vehicles while crossing the double yellow traffic control lines, and raced through more intersections, including a red light. (Exhibit A, 66-22:47:49; 78-22:46:56; 66-22:47:55; 66-22:48:28).

RESPONSE: The Plaintiff denies that he was being pursued by four officers from two separate jurisdictions. The Plaintiff admits that during the course of the pursuit, he passed vehicles on a double yellow line in violation of the traffic statutes. However, the Plaintiff would state that at least eight times during the pursuit, he utilized his blinkers while passing or making turning movements. Further, the Plaintiff would state that at no time during the course of the pursuit did he intentionally use his vehicle as a weapon or strike another motorist. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). Further, the Plaintiff submits that he slowed for the intersection of 74 and Kelly or Crosstown Drive. (Ercole depo. at 25-26).

11.

Given Harris' reckless actions and the clear danger posed to the public, the deputies determined that the pursuit needed to be brought to an end as soon as practicable. (Depo. of Reynolds, p. 114; Depo. of Scott, pp. 186-187; Depo. Of Fenninger, pp.54-56 and Exhibit 4, "Supplement Report"). Scott therefore requested and obtained

approval from his supervisor, Sgt. Mark Fenninger – as required by his training and the pursuit policy – to make physical contact with the vehicle in what is termed a "PIT" maneuver. (Exhibit A, 79-22:47:35; Depo. of Scott, pp. 143-44; Depo. of Fenninger, p. 53; Depo. of Sheriff Yeager, Exhibit 3, Coweta County Sheriffs Office Policies and Procedures Manual, p.93).

RESPONSE: While the Plaintiff admits that he was violating traffic laws, the Plaintiff denies that he was driving in such a reckless manner as to be a clear and present danger to the public and was in control of his vehicle until it was rammed off the road by Defendant Scott. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment).

The Plaintiff denies that Scott, Reynolds or Fenninger had any high-speed pursuit training. (Alpert Aff., Expert Rep. at 9-10; Yeager depo. at 35-36; Fenninger depo. at 9; Scott depo. at 16-18, 128-130; Reynolds depo. at 17, 29, 37, 46-47). Further, the CCSD failed to even ensure that its officers, including Reynolds, Scott and Fenninger, read and understood the CCSD Pursuit Policy. (Yeager depo. at 77). As the Defendants failed to have any high-speed pursuit training, the Plaintiff denies that any actions taking [sic] by the officers was pursuant to their training.

The Plaintiff admits that Scott requested permission from his supervisor, Fenninger, to use a PIT maneuver on the Plaintiff. (Scott depo. at 142-144; Fenninger depo. at 54-55). The Plaintiff further submits that neither Scott nor Fenninger were trained in the use of PIT maneuver. (Scott depo. at 137-139). Further, the Plaintiff submits that Fenninger was required as a supervisor to find out information about the pursuit concerning the charges, speeds,

traffic conditions, etc. and that he failed to properly determine the charges and traffic conditions prior to receiving the request to use the PIT maneuver by Scott. (Fenninger depo at 34-27).

Despite not performing his supervisory duties by determining the nature of the underlying offense and the presence of pedestrian or vehicular traffic, Fenninger responded to Scott request for permission to PIT by stating over the radio, "Go ahead and take him out. Take him out." (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Fenninger depo. at 54-55).

The Plaintiff submits that under the circumstances then and there existing, Scott requested permission to use deadly force as death or serious bodily injury could result from intentionally ramming the Plaintiff's vehicle. (Yeager depo. at 58, 96; Kinsey depo. at 44; Fenninger depo. at 62-63; Scott depo. at 153, 157; Reynolds depo. at 117-120; Ercole depo. at 37-40). Further, Fenninger expressly testified that when he authorized Scott to "take out" the Plaintiff, he was authorizing the use of deadly force. (Fenninger depo. at 62-63). Further, at the time of the ramming (application of deadly), there were no motorists in the area who were in fear of their life or personal safety. (See Defendants' Statement of Undisputed Facts at No. 13; Scott depo. at 147 and Ex. 1; Reynolds depo. at 121-123; Ercole depo. at 28, 47; Fenninger depo. at 60).

12.

Prior to the authorization, Fenninger was advised that Reynolds and Scott had pursued Harris into the parking lot of a shopping complex, and that Harris had hit

Scott's vehicle to effectuate his escape. (Depo. of Fenninger, pp. 38, 46 and 54-55). When Harris entered the commercial area of the shopping complex, Fenninger's concern was for the safety of pedestrians. (Depo. of Fenninger, pp.38-39). Once he was advised that Harris had struck Scott's vehicle, he authorized the PIT maneuver to get Harris stopped. (Depo. of Fenninger, pp. 54-55). Fenninger maintained radio contact with the deputies while on his way to the pursuit location. (Depo. of Fenninger, pp. 35 and 46).

RESPONSE: The Plaintiff denies that Fenninger was specifically advised that Reynolds and Scott had pursued the Plaintiff into a shopping center and that the Plaintiff had hit Scott's vehicle to effectuate an escape. The Plaintiff submits that Reynolds and Scott had broadcast over the radio that they were in pursuit of the Plaintiff and had entered a shopping complex and that there was a "10-50" (accident) in the parking lot. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Reynolds depo. at 110-11).

While the Plaintiff admits that Sgt. Fenninger testified that he was concerned for pedestrian traffic when the pursuit entered the shopping center, Sgt. Fenninger's concern for pedestrian traffic was unfounded as there was no pedestrian traffic in the parking lot and Sgt. Fenninger failed to request information pertaining to the vehicular and pedestrian traffic on the pursuit route. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Fenninger depo. at 34-39, 42-43).

Further, Fenninger admitted that he was authorizing the use of deadly force. (Fenninger depo. at 62-63). Fenninger further testified that under the CCSD Deadly Force

Policy, "Facts unknown to a Deputy, no matter how compelling, cannot be considered in later determination whether the use of lawful force, particularly deadly force, was justified." (*Id.* at 40; Scott depo. at Exhibit 12, pp. 82-83). Fenninger further testified that police work including the use of force must not be based on hunches, but particularized facts. (Fenninger depo. at 41). Despite these requirements, Fenninger authorized the use of deadly force without knowing anything about the dangers of the pursuit to third parties. (*Id.* at 60).

The Plaintiff denies that deadly force was appropriate under the circumstances as Fenninger authorized the use of deadly force without determining the nature of the underlying crime or whether the Plaintiff posed an immediate danger to the public. *Id.*

The Plaintiff admits that Sgt. Fenninger authorized the use of the PIT maneuver after the minor traffic accident between the Plaintiff and Scott. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff admits that Fenninger maintained radio contact with Scott and Reynolds after the accident. *Id.*

13.

Since Scott's vehicle was already damaged from the impact at the shopping complex, Scott assumed the lead position and approached the vehicle to perform the PIT maneuver. (Exhibit A, 66-22:47:21; 66-22:48:39). Due to the high rate of speed, Scott was unable to perform the PIT maneuver. Instead, he slowed his vehicle and tapped the rear bumper of Harris' vehicle. (Depo. of Scott, pp. 146-47). Scott decided to make direct contact with his push

bumper, while no other motorist were in the area. (Depo. of Scott, p.147). Harris' vehicle then left the roadway and crashed. (Exhibit A, 66-22:48:47).

RESPONSE: The Plaintiff admits that Scott took over as the lead vehicle in the pursuit after the accident in the parking lot. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff submits that Scott passed both Reynolds and Peachtree City Officer Ercole in his zealousness to become the primary unit in the pursuit. *Id.*

The Plaintiff denies that Scott was unable to perform the PIT maneuver because of his speed. The Plaintiff submits that Scott was never trained to perform the PIT maneuver, and, therefore, was unable to perform the PIT maneuver due to his lack of training. (Scott depo. at 137). In any event, the Plaintiff admits that the speeds were too great to properly perform or even attempt to perform a PIT maneuver.

The Plaintiff denies that Scott slowed his vehicle and tapped the rear bumper of the Plaintiff's vehicle, since it appears from the videotape that Scott sped up slightly in order to make contact. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment).

The Plaintiff further submits that ramming the Plaintiff's vehicle under the circumstances then and there existing amounted to the use of deadly and excessive force. (Yeager depo. at 58, 96; Kinsey depo. at 44; Fenninger depo. at 62-63; Scott depo. at 153, 157; Reynolds depo. at 117-120; Ercole depo. at 37-40).

The Plaintiff admits that at the time of the ramming (application of deadly), there were no motorists in the area

who were in fear of their life or personal safety. (See Defendants' Statement of Undisputed Facts at No. 13; Scott depo. at 147 and, Ex. 1; Reynolds depo. at 121-123; Ercole depo. at 28, 47; Fenninger depo. at 60). Accordingly, the Plaintiff submits that the Defendant's use of deadly force was improper as the Plaintiff posed no immediate threat to the officers or the public. (See article written by Defendants' Expert Mike Brave entitled "What is a Good Pursuit" – attached hereto as Exhibit "B"; Brave depo. at 171-72)

The Plaintiff admits that as a result of being rammed, his vehicle left the roadway and drove into off an embankment and into a drainage ditch, causing severe and permanent injuries to the Plaintiff (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment).

14.

The entire pursuit covered approximately nine miles, and lasted approximately six (6) minutes. (Exhibit A; Depo. of Reynolds, p.78). Although Harris has been rendered a quadriplegic, (Depo. of Harris, pp. 166-68), he fortunately survived, and no officer or third-parties were injured along the way as a result of his recklessness.

RESPONSE: The Plaintiff agrees that the pursuit covered 8 or 9 miles but denies that it lasted only 6 minutes because Defendant Reynolds' videotape indicates that the camera did not come on until some time after Reynolds had initiated the pursuit. (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment). The Plaintiff admits that he was rendered a quadriplegic as a result of being rammed by Scott. The Plaintiff further

admits that no officer or third party was injured as a result of his driving. *Id.*

II. PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS A GENUINE ISSUE TO BE TRIED

The following facts create a genuine issue for trial which cannot be resolved by summary judgment:

1. The vehicle that the Plaintiff was driving was registered in his name and at his proper address. (Accident Report attached hereto as Exhibit "A"; Harris depo. at 10).

2. During the course of the pursuit, Reynolds obtained the Plaintiff's vehicle's tag number. (Reynolds depo. at 81-83).

3. The reason for initiating the pursuit was for speeding – 73 mph in a 55 mph zone. (Reynolds depo. at 73-75).

4. Sgt. Fenninger did not have any pursuit training in basic training at POST. (Fenninger depo. at 9).

5. Deputy Scott had EVOC training[2], but no pursuit training. (Scott depo. at 16-18).

6. Deputy Scott never received any training on the CCSD policies and procedures, including the CCSD pursuit policy. (Scott depo. at 128-130).

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[2] EVOC refers to emergency vehicle operations training. This training focuses solely on the physical aspects of driving a vehicle in an emergency setting and not the philosophy of pursuits or pursuit policies. (Scott at 16-18).

7. Deputy Scott did not know whether he was required to comply with the CCSD policies and procedures. (Scott depo. at 128-130).

8. Deputy Reynolds, Scott and Fenninger had no training on the PIT maneuver. (Scott depo. at 137; Kinsey depo. at 22, 47).

9. Deputy Reynolds had EVOC training, but no pursuit training. (Reynolds depo. at 17).

10. Deputy Reynolds had no training on pursuits in basic training at POST. (Reynolds depo. at 37).

11. Deputy Reynolds had no training on pursuits at CCSD. (Reynolds depo. at 17, 29, 46-47).

12. There is an obvious need to provide training on pursuits and use of deadly force. (Yeager depo. at 32-34).

13. Sheriff Yeager and Coweta County never provided their officers with training on pursuits. (Yeager depo. at 36).

14. Sheriff Yeager and Coweta County provided deadly force training to their officers which consisted solely of firearm certification and familiarity with the firearms they use. (Yeager depo. at 35).

15. A police vehicle can be used as an instrument of deadly force. (Yeager depo. at 36; Fenninger depo. at 21; Scott depo. at 18, 21-22; Reynolds depo. at 31-32).

16. Sheriff Yeager and Coweta County failed to provide its officers with any training on the use of deadly force during the course of pursuits. (Yeager depo. at 37, 54).

17. Sheriff Yeager and Coweta County failed to provide their officers with any training concerning under what circumstances their officers can use deadly force. (Yeager depo. at 38-39).

18. Pursuant to the CCSD Use of Force Policy, Deadly Force is defined as "force which, under the circumstances in which it is used, is readily capable of causing death or serious bodily injury." (Scott depo. at Ex. 12, p 82).

19. Deputy Scott requested authorization from his supervisor, Sgt. Fenninger to PIT the Plaintiff's vehicle. (Scott depo. at 142-144; Fenninger depo. at 54-55).

20. As a supervisor, Fenninger was required to find out information about the pursuit concerning the charges, speeds, traffic conditions, etc. and that Fenninger failed to properly determine the charges and traffic conditions prior to receiving the request to use the PIT maneuver by Scott. (Fenninger depo. at 34-37).

21. Despite not performing his supervisory duties by determining the nature of the underlying offense and the presence of pedestrian or vehicular traffic, Fenninger responded to Scott's request for permission to PIT by stating over the radio, "Go ahead and take him out. Take him out." (Videotapes attached as Exhibit "A" to Defendants' Motion for Summary Judgment; Fenninger depo. at 54-55).

22. Under the circumstances then and there existing, Scott requested permission to use deadly force as death or serious bodily injury could result from intentionally ramming the Plaintiff's vehicle. (Yeager depo. at 58, 96; Kinsey depo. at 44; Fenninger depo. at 62-63; Scott

depo. at 153, 157; Reynolds depo. at 117-120; Ercole depo. at 37-40).

23. Further, Fenninger testified that when he authorized Scott to "take out" the Plaintiff, he was expressly authorizing the use of deadly force. (Fenninger depo. at 62-63).

24. Further, at the time of the ramming (application of deadly), there were no motorists in the area who were in fear of their life or personal safety. (See Defendants' Statement of Undisputed Facts at No. 13; Scott depo. at 147 and Ex. 1; Reynolds depo. at 121-123; Ercole depo. at 28, 47; Fenninger depo. at 60).

25. The application of deadly force was inappropriate under the circumstances then and there existing. (Alpert Aff., Expert Rep. at 11; Ercole depo. at 34-35; Article written by Defendants' expert Mike Brave entitled "What is a Good Pursuit" attached hereto as Exhibit "B").

26. Sheriff Yeager and Coweta County have 80 sworn officers and no internal affairs division. (Yeager depo. at 87).

27. Sheriff Yeager and Coweta County did not investigate this incident. (Scott depo. at 193-194; Reynolds depo. at 130).

28. Sheriff Yeager and Coweta County do not keep records or statistics on pursuits. (Yeager depo. at 125-126).

29. Sheriff Yeager and Coweta County have never fired an officer for improper use of force or violation of the pursuit policy. (Yeager depo. at 152).

30. The conduct of Scott, Reynolds and Fenninger in this action was in compliance with the policies, practices and customs of Sheriff Yeager and Coweta County. (Defendants' Response to Plaintiff's First Request for Admissions, No. 6 thru 9; Depo. of Kinsey at 7-8, 39, and Ex. 1; Fenninger depo. at 67-70).

31. Deputy Scott, Deputy Reynolds and Sgt. Fenninger were not investigated, reprimanded or disciplined for their actions in this incident. (Scott depo. at 193-194; Reynolds depo. at 130; Fenninger depo. at 67-70).

32. The injuries sustained by the Plaintiff were caused by the policies, practices and customs of Sheriff Yeager and Coweta County. (Alpert Aff., Expert Rep. at 10-12).

33. The injuries sustained by the Plaintiff were caused by the failure of Sheriff Yeager to train its deputies with respect to high speed pursuits and the proper use of deadly force. (Alpert Aff., Expert Rep. at 9-12).

34. The injuries sustained by the Plaintiff were caused by the failure of Sheriff Yeager and Coweta County to provide proper pursuit and deadly force policies to its deputies. (Alpert Aff., Expert Rep. at 10-12).

35. The injuries sustained by the Plaintiff were caused by the failure of Sheriff Yeager and Coweta County to properly investigate and discipline its deputies. (Alpert Aff., Expert Rep. at 10-12).

36. Defendants' expert, Mike Brave, has written an article entitled, "What is a Good Pursuit?" (Brave depo. at 171-172; Article attached hereto as Exhibit "B").

37. Mr. Brave's article, "What is a Good Pursuit?" indicates that the use of deadly force to apprehend a fleeing suspect in circumstances similar to the facts of the instant case is unconstitutional. (Brave depo. at 171-172; Article attached hereto as Exhibit "B").

38. The patrol car used by Defendant Scott to ram Victor Harris was owned and insured by Coweta County. (Accident report attached hereto as Exhibit "A").

39. At the time of this incident, Coweta County maintained liability insurance policies providing $1 million in automobile liability coverage, $2 million in law enforcement liability coverage, and $3 million in public official liability coverage ($6 million) which are applicable to the Plaintiff's claims against the Defendants for damages arising from the ownership, use, operation and/or maintenance of motor vehicles. (See liability policies attached hereto as Exhibit "C").

40. Portions of the pursuit of Victor Harris, as well as conversations and events at the crash immediately thereafter, are depicted by the videotapes made by the Peachtree City patrol cars driven by Sgt. Brown and Cpl. Ercole. (See the single videotape attached hereto as Exhibit "D", which contains the video recordings made by both patrol cars).

Respectfully submitted this 14 day of November, 2002.

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[Certificate Of Service Omitted In Printing]

[Exhibits Omitted In Printing]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

VICTOR HARRIS, Plaintiff, v. COWETA COUNTY, GEORGIA, SHERIFF MICHAEL S. YEAGER, SGT. MARK FENNINGER, DEPUTY CLINTON D. REYNOLDS, and DEPUTY TIMOTHY SCOTT, Defendants.	CIVIL ACTION FILE NO. 3:01-CV-148-WBH

ORDER

(Filed Sep. 25, 2003)

Before the Court is Defendants' motion for summary judgment [36]. Also before the Court is Defendants' motion to amend answer [65], which is granted as unopposed. For the reasons set forth below, Defendants' motion for summary judgment is granted in part and denied in part.

BACKGROUND

As this case is before the Court on Defendants' motion for summary judgment, the Court must view the facts in the light most favorable to Plaintiff, the non-movant. *Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993). Viewed in this light, the following facts emerge.

The chase

At 10:42 p.m. on March 29, 2001, Deputy Clinton Reynolds of the Coweta County Sheriff's Office was stationed on Highway 34 when he clocked Plaintiff Victor Harris's vehicle traveling at 73 miles per hour in a 55 miles-per-hour zone. The vehicle that Harris was driving was registered in Harris's name and at his proper address. Although Reynolds flashed his blue lights, Harris refused to slow down and continued driving. According to Harris, he refused to stop because he was scared, wanted to get home, and was hoping to avoid an impound fee for his car.

Reynolds made a decision to pursue Harris, and followed the vehicle in the direction of Peachtree City, using his flashing lights in an attempt to get Harris to stop. Just past Sullivan Road, Reynolds caught up with Harris and turned on his lights and siren, which activated his video camera. Harris still refused to stop and then sped up, beginning a high-speed chase. Harris admits that during the course of the pursuit, he drove well in excess of the speed limits, passed vehicles on a double yellow line, and ran a red light at the intersection of Highway 34 and Fisher Road. Despite these traffic violations, Plaintiff contends that he used his turn signals when passing or turning, and maintained control over his vehicle.[1]

After Harris refused to stop, Reynolds radioed dispatch and reported that he was pursuing a fleeing vehicle, and he broadcast its license plate number. Reynolds did

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[1] The speed of the chase is disputed. Defendants contend that it was in excess of 100 miles per hour. Plaintiff denies that he drove that fast, but agrees that Scott, in his "overzealousness to join the pursuit" drove his cruiser at speeds well over 100 miles per hour.

not, however, broadcast the underlying charge (speeding). Although not specifically requested to join the pursuit, Coweta County Deputy Chuck Scott heard Reynolds' radio communication and decided to join the pursuit.

After crossing into Peachtree City, Harris slowed down, activated his blinker, and turned into a drugstore parking lot located in a shopping complex. Reynolds followed Harris as he drove through the parking lot toward Highway 74 while Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot and getting onto Highway 74. The parties dispute what happened next. According to Harris, Scott drove his vehicle directly into Harris's path, while Reynolds was in pursuit from behind. When he realized that Scott was in his lane of traffic, Harris attempted to turn to the left to avoid hitting Scott's car, but the two vehicles came in contact with each other, causing minor damage to Scott's cruiser.[2] Harris then entered Highway 74 and continued to flee at a high speed. At that time, Sgt. Mark Brown of the Peachtree City Police Department ordered his fellow Peachtree City officers to block intersections from cross-traffic.

As the pursuit continued through Peachtree City, Scott took over as the lead vehicle. After leaving the parking lot and getting on Highway 74, Scott requested and obtained approval from his supervisor, Sergeant Mark Benninger, to make physical contact with Harris's vehicle

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[2] Defendants assert that Harris was boxed in by the officers and deliberately rammed Scott's cruiser in an attempt to get away. Harris maintains that the crash was unintentional.

in what is termed a "PIT" maneuver.[3] Although unaware of the underlying offense of which Harris was suspected, Scott wanted to use the PIT maneuver to end the chase as soon as possible because he felt that Harris was acting in a reckless and extremely dangerous manner. At the time the request was made, there were no motorists or pedestrians in the area, which was due, in part, to the Peachtree City officers' decision to blockade intersections.

While it is disputed whether Fenninger knew about the collision between Harris and Scott in the parking lot, the evidence indicates that Fenninger was concerned about the safety of pedestrians and felt that Harris had to be stopped. In granting Scott permission to make contact with Plaintiff's vehicle, Fenninger stated over the radio, "Go ahead and take him out. Take him out" According to Harris's version of the facts, Fenninger was never made aware that the pursuit originated with a speeding violation.

After receiving approval from Fenninger to make contact with Harris's vehicle, Scott determined that he could not perform the PIT maneuver because he was going too fast. Scott then decided to hit Harris's bumper, presumably in a manner different from a PIT maneuver. The parties dispute whether Scott slowed down or sped up, but they agree that he ran his cruiser into Harris's vehicle, causing Harris to lose control. Harris's vehicle left the roadway, ran down an embankment, and crashed. As a

[3] A PIT maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point which throws the car into a spin the driver cannot control, bringing the car to a stop.

result, Harris was rendered a quadriplegic. No one else was injured.

Coweta County's policies

Under the vehicle pursuit policy of the Coweta County Sheriff's Office in effect at the time of the incident, decisions regarding the initiation, continuation, and termination of pursuits were left to the discretion of the officer and supervisor in the field. Specifically, the policy states that "the pursuing deputy should keep in mind his personal safety and try everything within his authority to apprehend the violator without resorting to a high-speed chase." This type of policy, which leaves the decision about pursuits to the discretion of the officer in the field and the supervisor, is called a "judgmental policy." Across the country, a majority of police departments had such judgmental policy in force at the time of the incident involving Harris.

Included in the pursuit policy is a provision that "deliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." Additionally, the policy states that the officer should discontinue the pursuit when "upon weighing the pertinent factors, the gravity of the offense and the prospect of losing the suspect will not balance with the hazards to the Deputy and the public" or "upon receipt of additional information once the pursuit has begun that would allow later apprehension and successful prosecution."

Training

It is undisputed that Coweta County Sheriff's Deputies had all of the training required by the State of Georgia, including emergency vehicle operations ("EVOC") training. EVOC training focuses solely on the physical aspects of driving a vehicle in an emergency setting and not on the philosophy of pursuits or pursuit policies. The County also required its officers to have an additional twenty hours of training. The County, however, did not provide any training in high-speed pursuits or the use of deadly force other than that included in basic officer training provided by the state police academy. The only deadly force training provided to Coweta County officers related to firearms. Although the pursuit policy authorized the deputies to make "deliberate physical contact between vehicles" under certain circumstances, the officers were not trained in how to determine whether to make such contact or in how to safely make such contact. Additionally, Scott admitted that he never received any training on the County's policies and procedures, including the pursuit policy.

The lawsuit

On October 16, 2001, Harris filed a Complaint against Scott, Reynolds, and Fenninger, as well as Coweta County and Sheriff Michael Yeager. Pursuant to 42 U.S.C. § 1983, Harris alleges a violation of his rights under the Fourth and Fourteenth Amendments. Furthermore, under state law, he asserts claims under the Georgia Constitution as well as various common law tort claims.

In his response to the motion for summary judgment, Harris concedes that summary judgment is appropriate on

the following claims: all claims against Reynolds, all state law claims against Sheriff Yeager, and all other state law claims except for the negligence and battery claims against Scott, Fenninger, and Coweta County. The Court will address each of the remaining claims in turn.

DISCUSSION

Summary judgment standard

Summary judgment is proper when no genuine issue as to any material fact is present, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The movant carries the initial burden and must show that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

Defendants' motion

I. Federal Claims

A. Fourth Amendment claim against Defendant Scott

In Count I of his Complaint, Harris alleges that Defendant Scott violated his Fourth Amendment rights by using excessive force to stop his vehicle. "The first step in reviewing an excessive force claim is to determine whether the plaintiff was subjected to the 'intentional acquisition of physical control' by a government actor – that is, whether there was a 'seizure' within the meaning of the Fourth Amendment." *Vaughan v. Cox,* No. 00-14380, 2003 U.S. App. LEXIS 18066, at *9-10 (11th Cir., August 29, 2003) (quoting *Brower v. County of Inyo,* 489 U.S. 593, 596 (1989)). The Supreme Court has held that a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." *Brower,* 489 U.S. at 597. It is clear to the Court that the *Brower* standard has been met in this case. Scott rammed Harris's vehicle for the purpose of stopping it, and the ramming did, in fact, cause the vehicle to come to a stop. A seizure, therefore, occurred.[4]

Having concluded that Harris was subjected to a seizure, the Court now turns to the merits of Harris's Fourth Amendment claim that he was subjected to an unreasonable seizure because of Scott's use of excessive force. Such claims are subject to an objective reasonableness inquiry: "the

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[4] Defendants essentially concede that a seizure occurred. In their brief, they argue that officers Reynolds and Fenninger did not seize Plaintiff, but they do not include Scott in this argument. *See* Defs.' Br. [36] at 10-12.

question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor,* 490 U.S. 386, 397 (1989). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

In their motion, Defendants argue that there was no constitutional violation because Scott's use of force was non-deadly and was objectively reasonable.[5] They contend

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[5] In support of this argument, Defendants rely exclusively upon dicta from *Adams v. St. Lucie County Sheriff's Dept.,* 962 F.2d 1563 (11th Cir. 1992); *rev'd,* 998 F.2d 923 (11th Cir. 1993 (per curiam). In *Adams,* the defendant officer intentionally rammed a fleeing misdemeanant several times following a high-speed pursuit through a residential neighborhood, and the final blow caused the car to go out of control. The car crashed, and the passenger was killed. The Eleventh Circuit struggled with this case, initially affirming the denial of summary judgment on qualified immunity grounds, *see* 962 F.2d at 1572, and then issuing a subsequent opinion reversing the denial of summary judgment for the reasons set forth in Judge Edmonson's dissent in the original opinion, *see* 998 F.2d 923. Judge Edmonson reasoned that the officers were entitled to qualified immunity because in 1985, the law was not clearly established that ramming a vehicle constituted a seizure. *See id.* at 1576. He then goes on to opine that ramming a fleeing vehicle did not constitute a violation of the Fourth Amendment. *See id.* at 1577.

In the two-sentence second opinion, the Court did not adopt Judge Edmonson's dissent as its opinion, but rather reversed the district court based on the "reasoning" of the dissent. This Court concludes that the

(Continued on following page)

that Harris presented a significant danger because he was driving recklessly at high speeds and had hit Scott's vehicle. Plaintiff responds that Scott used deadly force, and that such force was unreasonable because Harris was a traffic offender, and the officers could have used alternative means to arrest him at a later time.

Regardless of whether the force was deadly or not, Harris's excessive force claim is judged by the "objective reasonableness" standard set forth in *Graham v. Connor*. *See* 490 U.S. 395.[6] *Graham* instructs that the Court must examine the facts carefully and provides three examples of questions relevant to the inquiry: (1) how severe was the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether he was attempting to evade arrest by flight. *See Graham*, 490 U.S. at 396. Applying the *Graham* analysis to the facts of this case, the Court concludes that a reasonable jury could find, under Harris's version of the facts, that Scott's use of force was unconstitutional because it was not an objectively reasonable use of force.

The central fact that guides this Court's decision is that, prior to Reynolds' decision to instigate a high-speed

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reasoning of the dissent focused on qualified immunity and whether the law with respect to seizures was clearly established. Thus, Judge Edmonson's discussion of whether ramming a vehicle constitutes a Fourth Amendment violation is dicta. Moreover, the Court's "reasoning" with respect to qualified immunity is called into question by the Supreme Court decision in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), and the Eleventh Circuit's recent decision in *Vaughan*, 2003 U.S. App. LEXIS 18066.

[6] Because the "objective reasonableness" standard applies regardless of whether the force applied was deadly or not, this Court need not decide whether Scott used deadly force.

chase, Harris's only crime was driving 73 miles per hour in a 55 miles-per-hour zone. A rational fact finder could find that a reasonable officer would not have believed that because of his traffic offense, Harris posed an immediate threat to the safety of others. The record does not reflect that he had menaced or was likely to menace others.

Defendants do not address this point in their brief, rather focusing exclusively on Harris's conduct during the chase. The Court is mindful that traffic laws are designed for public safety and that by breaking these laws – by speeding, improper passing, and even failing to stop – Harris acted in an unsafe manner; however, the record reflects that he maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road. With the exception of the incident with Scott's vehicle in the parking lot, which is addressed below, Harris did not use his vehicle in an aggressive manner.

Defendants argue that the crash in the parking lot between Harris's car and Scott's cruiser demonstrated that Harris presented a significant danger to others. Viewing the facts in Harris's favor, however, it appears that either Scott hit Harris, or that the crash was an accident. According to the official report submitted by Sgt. Mark Brown of the Peachtree City Police Department as well as the testimony of Harris, Scott rammed Harris's car. These facts rebut Defendants' assertion that Harris aggressively used his vehicle to strike Scott's cruiser. Additionally, the decision to ram the vehicle came minutes later, when Harris was driving away from officers, and when there were no other motorists or pedestrians nearby, thus casting doubt on Defendants' assertion that at the time of the ramming, Harris posed an immediate threat of harm

to others. Finally, the Court has also considered the fact that the officers had the license plate number for Harris's vehicle, and the vehicle had not been reported stolen. Reasonable officers, therefore, would have known that they could have followed up on the license plate information at a later time.

Under this version of the facts, a fact finder could conclude that when Scott rammed Harris's vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott's use of force – ramming the car while traveling at high speeds – was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable. *See Vaughan,* 2003 U.S. App. LEXIS 18066, at *16 (stating that a reasonable jury could conclude that an officer's use of deadly force against two fleeing suspects was unreasonable where the officer "simply faced two suspects who were evading arrest and who had accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone in an attempt to avoid capture.") Thus, a fact issue remains regarding whether Scott violated the Fourth Amendment by using excessive force to seize Harris.

Having concluded that the facts alleged could establish a constitutional violation, the Court now turns to Scott's defense of qualified immunity. In deciding whether Scott is protected by qualified immunity, the Court must determine whether Harris's rights were clearly established – that is, whether it would have been clear to a reasonable officer that Scott's conduct was unlawful. *See Saucier v. Katz,* 533 U.S. 194, 201-202 (2001). "It is well-settled that a constitutional right is clearly established only if its

contours are 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Vaughan,* 2003 U.S. App. LEXIS 18066, at *19 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). Thus, "qualified immunity is appropriate in close cases where a reasonable officer could have believed that his actions were lawful." *Lee v. Ferraro,* 284 F.3d 1188, 1200 (11th Cir. 2002). The Supreme Court, however, has cautioned that in applying the qualified immunity analysis, courts should not be unduly rigid, but rather should see if the law gave the defendant "fair warning" that the alleged conduct was unconstitutional. *See Hope v. Pelzer,* 536 U.S. 730, 741 (2002).

At the time of the incident, the law was clearly established that the level of force appropriate in a situation depended, at least in part, on the crime that the fleeing suspect was thought to have committed. *See Tennessee v. Garner,* 471 U.S. 1, 11-12 (1985) (setting forth the standard for the use of deadly force to subdue a fleeing felon and recognizing that common law prohibited the use of deadly force to apprehend a misdemeanant); *Graham,* 490 U.S. at 396 (stating that one of the factors that an officer should consider is the severity of the crime in issue). In the present case, the facts indicate that Scott did not know the underlying charge when he decided to join in the chase or at the time that he rammed the vehicle. Defendants rely heavily upon the crash in the parking lot to show that Harris was dangerous, but the evidence, when viewed in Harris's favor, indicates that a large part of the responsibility for the parking lot incident rests with Scott who deliberately drove into Harris's line of traffic. Although the Court is loath to question the judgment of police officers and recognizes that Defendants' version of the facts is

quite different from Plaintiff's version, the Court is compelled to conclude that there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury. *Anderson,* 477 U.S. at 251-52. Defendants' motion for summary judgment on this claim is DENIED.

B. Fourth Amendment claim against Defendant Fenninger

It is undisputed that, at the time Scott rammed Plaintiff's car, his supervisor, Defendant Fenninger, was miles away from the accident. "Supervisory officials are not liable under section 1983 on the basis of respondeat superior or vicarious liability." *Hardin v. Hayes,* 957 F.2d 845, 849 (11th Cir. 1992). To recover individually from a person such as Fenninger in a supervisory administrative capacity, the plaintiff must show that the supervisor is liable either through personal participation in the acts comprising the alleged constitutional violation, or the existence of a causal connection linking the supervisor's actions with the violation. *See Hill v. DeKalb Regional Youth Detention Ctr.,* 40 F.3d 1176, 1192 (11th Cir. 1994) (overruled in part by *Hope v. Pelzer,* 536 U.S. 730, 739 n.9 (2002)).

Here, Plaintiff argues that Fenninger is liable for the Fourth Amendment violation because he explicitly authorized Scott to use unreasonable force to stop the vehicle, and, therefore, personally participated in the use of excessive force. Defendants respond that Fenninger cannot be held liable because he did not effect a "seizure" of the vehicle.

The evidence shows that Scott requested and obtained approval from Fenninger to make physical contact by executing a PIT maneuver. Fenninger granted permission without inquiring about the underlying crime for which Harris was being pursued, and without asking whether there were any motorists or pedestrians in the area. Fenninger authorized the force, even though neither he nor Scott were trained in how to safely carry it out. In granting Scott permission to undertake this dangerous act, Fenninger stated over the radio, "Go ahead and take him out. Take him out."

The Court agrees with Plaintiff that, to the extent a jury may find a Fourth Amendment violation on the part of Scott, they may also find that Fenninger is liable because he personally participated in the decision to use the excessive use of force by explicitly authorizing it. The fact that he was not physically present at the scene does not absolve him of liability, since a reasonable inference can be drawn that but for his authorization, Scott would not have struck Plaintiff's vehicle. Defendants' motion for summary judgment on this claim is DENIED.[7]

C. Fourteenth Amendment claim against Defendants Scott and Fenninger

It appears that Plaintiff brought the Fourteenth Amendment claims as alternatives to his Fourth Amendment claims. *See* Pl.'s Br. at 16-17 (stating that the Court

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[7] Defendants do not specifically argue that Fenninger is entitled to qualified immunity, but the Court has considered this issue. For the same reasons that Scott is not entitled to qualified immunity as a matter of law, the Court concludes that Fenninger is not entitled to qualified immunity as a matter of law.

need not address the Fourteenth Amendment claims if it finds a Fourth Amendment violation). Because the Court has denied Defendants' motion for summary judgment on the Fourth Amendment claims, the Court need not address Plaintiff's Fourteenth Amendment claims, and Defendants' motion for summary judgment with respect to these claims, therefore, is GRANTED.[8]

D. Individual liability against Sheriff Yeager

Plaintiff concedes that Sheriff Yeager did not personally participate in any actions leading to the seizure of Harris, but he contends that Sheriff Yeager may be held liable in his individual capacity for acts or omissions which proximately led to the violation of Harris's rights. Specifically, Plaintiff claims that the Sheriff should have trained his deputies in how to conduct high speed chases, in how to safely effect ramming techniques such as the PIT maneuver, and in how to determine when chases and ramming techniques are appropriate. In some situations, supervisors may be held liable for failing to train and supervise their subordinates adequately. *See Dolihite v. Maughon by and through Videon*, 74 F.3d 1027, 1052 (11th Cir. 1996).

Even assuming, for purposes of this Order, that there was a causal connection between Sheriff Yeager's failure to

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[8] Additionally, the Court concludes that the Fourteenth Amendment claim, based on Scott's alleged conscience-shocking conduct, lacks merit. There is no evidence that Scott had "a purpose to cause harm unrelated to the legitimate object of arrest." *See Lewis*, 523 U.S. at 836; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998) (stating that the Fourteenth Amendment applies to high-speed pursuits only if there has been no seizure to implicate the Fourth Amendment).

train and Plaintiff's injuries, this claim fails because the Sheriff is entitled to qualified immunity. The undisputed evidence shows that Coweta County Sheriffs Deputies had all of the training required by the State of Georgia. Plaintiff cites to no law or constitutional right that required Sheriff Yeager to train his employees in the manner suggested by Plaintiff. In the absence of such authority, Sheriff Yeager is entitled to immunity from suit. *See Riley v. Newton*, 94 F.3d 632, 637 (11th Cir. 1996) (granting to sheriff summary judgment on qualified immunity grounds and distinguishing the qualified immunity standard for failure to train claims from the standard applicable to such claims against municipalities). Defendants' motion for summary judgment on this claim is GRANTED.

E. Municipal liability against Coweta County[9]

In order for Harris to make out a claim for municipal liability under Section 1983, he must identify a municipal policy or custom that caused his injury. See *Grech v. Clayton County*, 335 F.3d 1326, 1329 (11th Cir. 2003). To establish a county policy, a plaintiff may identify either an officially-promulgated county policy or an unofficial custom or practice of the county shown through the repeated acts of a final policymaker for the county.

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[9] Harris has also sued Sheriff Yeager and the deputies in their official capacities. A claim against these defendants in their official capacities is the same as a claim against Coweta County. *See Kentucky v. Graham*, 473 U.S. 159 (1985). Because suits against county officials in their official capacities are the functional equivalent of a suit against the county, there is no need to bring official-capacity actions against local governmental officials. Defendants' motion for summary judgment on these claims, therefore, is GRANTED. *See Busy v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991).

See id. "Because a county rarely will have an officially-adopted policy of permitting a particular constitutional violation, most plaintiffs, . . . must show that the county has a custom or practice of permitting it and that the county's custom or practice is the moving force behind the constitutional violation." *Id.* (internal quotations omitted). Plaintiff has articulated two theories for municipal liability: (1) the County had an unconstitutional policy of engaging in high-speed chases to pursue fleeing offenders which is evidenced by the County's failure to discipline its officers and others involved in similar incidents; and (2) the County's failure to properly train and supervise its officers in the face of an obvious need to train constitutes deliberate indifference to the safety of county residents.

1. Failure to discipline

Harris contends that Coweta County has an informal policy or custom allowing its deputies to engage in high-speed chases and use deadly force in inappropriate circumstances. Plaintiff's expert opined that "the custom and practice of the Coweta County Sheriff's Office is to ratify and encourage the use of deadly force against fleeing offenders without regard for the underlying offense or the immediacy and severity of the treat posed by the offender." As evidence of this informal policy or custom, Plaintiff relies upon the fact that the officers involved in this case were not disciplined and that Defendants have admitted the officers violated no official county policy. Plaintiff's expert also states that the County was on notice of this problem because of two prior incidents involving a deputy named Cox, who he claims had been involved in two prior pursuits in which deadly force was used against violators who were not suspected of violent felonies.

Defendants respond, and the Court agrees, that Plaintiff has not presented sufficient evidence to make out a claim against Coweta County on this basis. First, Plaintiff has presented no evidence that any officially-adopted policy was unconstitutional. Rather, Plaintiff's evidence is that the County's high-speed pursuit policy, described as a "judgmental policy," is widely used throughout the country, and in fact is adopted by the majority of the jurisdictions.

Second, Plaintiff has not presented sufficient evidence that there was any unofficial custom or practice of engaging in high-speed chases and improperly using excessive force. Plaintiff's expert referenced only two prior high-speed pursuits, and presented no specific evidence regarding the facts of these two incidents.[10] Vague references to two prior incidents do not constitute ratification and encouragement of an unconstitutional policy. *See Bannum, Inc. v. City of Ft. Lauderdale*, 901 F.2d 989, 998 n.29 (11th Cir. 1990) (noting that an employee's unconstitutional decisions must have been made repeatedly to have become a "custom or usage" of which his or her supervisor must have known and approved.); *see also Gilmere v. Atlanta*, 737 F.2d 894, 904-05 (11th Cir. 1984) ("occasional acts of untrained policemen standing alone are not attributable to city policy or custom). Additionally, the failure of the County to discipline the officers

[10] The Court, of course, is familiar with the facts of at least one of Deputy Cox's high-speed chases, which are recounted in the various opinions issued by the Eleventh Circuit. *See e.g. Vaughan*, 2003 U.S. App. LEXIS 18066. The Court, however, does not have sufficient facts before it to determine, as a matter of law, that the County had a custom or practice of permitting such chases or permitting the inappropriate use of deadly force. Moreover, Plaintiff has presented no competent evidence concerning the County's alleged failure to discipline Cox.

or conduct an investigation into this particular incident is insufficient evidence to establish a custom. Without evidence that the County persistently failed to discipline officers for such known unconstitutional conduct, such a policy cannot be inferred from the County's isolated decision not to discipline the officers involved in this incident. *See McQurter v. City of Atlanta*, 572 F. Supp. 1401, 1420 (N.D. Ga. 1983) (Forrester, J.) (internal citations omitted) (refusing to infer a policy of using excessive force based on evidence of a failure to discipline in one case only). For these reasons, Defendants' motion for summary judgment on this claim is GRANTED.

2. Failure to train

A municipality can be held liable under Section 1983 for inadequately training or supervising its employees only in limited circumstances. The inadequate training or supervising must evidence the municipality's "deliberate indifference" to the rights of the inhabitants so as to amount to a policy or custom that is actionable under Section 1983. *See Gold v. City of Miami, Fla.*, 151 F.3d 1346, 1350 (11th Cir. 1998) (quoting *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989)). Deliberate indifference is shown by "evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action." *Id.*

One of the ways a plaintiff may demonstrate a county's deliberate indifference is by showing that the need for a particular type of training is obvious, even without prior incidents to place the municipality on notice. *Young v. City of Augusta, Ga.*, 59 F.3d 1160, 1172 (11th Cir.

1995). One example of such an obvious need is the use of deadly force where firearms are provided to police officers. *See Gold*, 151 F.3d at 1351 Here, Plaintiff argues, and the Court agrees, that there was an obvious need for training with respect to high-speed chases since the Coweta County officers were vested with the discretion to embark on high-speed chases and were allowed to ram vehicles under certain circumstances.[11] Indeed, the official pursuit policy authorized this conduct.

At his deposition, Sheriff Yeager testified that high-speed pursuits and PIT maneuvers are high risk activities that create an obvious need for training. Plaintiff's expert has also opined that pursuit driving and ramming techniques such as that used by Scott against Harris are high-risk activities which obviously require training. Thus, the Court concludes that Plaintiff has provided sufficient evidence to create a fact issue as to whether – giving a police officer a vehicle and the discretion to use it in an offensive – and perhaps deadly – manner creates a need to train that is 'so obvious' that, even without notice of prior constitutional violations, the County had a duty to train. *See Gold*, 151 F.3d at 1352; *see also Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000) (finding that the need to train officers in how to make arrests with force is so obvious that the failure to train in this area amounts to deliberate indifference to constitutional rights). Thus, a

[11] While the Court has discounted Plaintiff's vague evidence regarding prior incidents, the facts of *Vaughan* demonstrate that, at the time of the incident involving Harris, Coweta County certainly knew that its officers had the means as well as the discretion to embark on dangerous high-speed chases and to use force during those chases.

fact issue remains on the issue of whether the County's failure to train amounted to deliberate indifference.

As a final argument, Defendants respond that Plaintiff has failed to present competent evidence that the lack of training was the "moving force" behind, i.e., directly caused, the injuries suffered by Harris. The Court is not persuaded by this argument. A reasonable inference can be drawn from Plaintiff's evidence that a training course would have taught the officers to consider the underlying offense and whether other means – such as tracing the license plate number – could be used to capture the suspect at a later time. Another reasonable inference is that, had the officers attended such a training course, they would have considered these factors, applied them in a reasonable manner, and decided against ramming Harris's car, and perhaps even against embarking on the chase in the first place.

Given these conclusions, the Court finds that Harris has carried his summary judgment burden of showing that the County's failure to train its officers constituted a policy decision for which the County can be held liable under Section 1983. Defendants' motion for summary judgment on this claim, therefore, is DENIED.

II. State Claims

A. Negligence and battery claims against Defendants Scott and Fenninger

Plaintiff alleges that Scott was negligent by (1) attempting a PIT maneuver at high speeds on a two-lane road without any training; (2) operating his vehicle in an unsafe manner; and (3) ramming Plaintiff's vehicle. Plaintiff alleges that Fenninger was negligent in authorizing Scott's

conduct without first obtaining the information necessary to evaluate the situation and make a proper decision. Defendants do not dispute that Plaintiff has made out a prima facie case of negligence, but rather respond that the officers are entitled to official immunity.

County employees are immune from liability unless they negligently perform ministerial tasks or act with actual malice in perforating discretionary tasks. *See* Ga. Const. of 1983, Art. I, Sec. II, Par. IX(d); *Gilbert v. Richardson*, 264 Ga. 744, 747 (1994). The decision to make an arrest is a discretionary act. *See Anderson v. Cobb*, 258 Ga. App. 159, 160 (2002). Plaintiff contends that his evidence supports a finding that Defendants Scott and Fenninger acted with actual malice because (1) both officers admit that the ramming of the car was deliberate and likely to cause harm and (2) Fenninger stated "take him out."

The evidence in this case demonstrates that Scott and Fenninger's intention was to stop Plaintiff's car – not to injure him. While Plaintiff may credibly argue that the officers violated his constitutional rights, his evidence simply does not support a conclusion that the officers intended to harm him. *See Anderson*, 258 Ga. App. at 160 (stating "[i]ll will alone is insufficient to establish actual malice; [the plaintiff] must show that [the defendant] acted with the deliberate intent to commit a wrongful act or with the deliberate intent to harm [him]."). In the absence of evidence of actual malice, Scott and Fenninger are immune from the state law claims, and Defendants' motion for summary judgment on these claims is GRANTED.

B. Negligence claim against Coweta County

Despite the general rule that counties have sovereign immunity from tort claims, Plaintiff asserts that Coweta County nevertheless can be held liable for the state-law torts allegedly committed by Defendants Scott and Fenninger because Coweta County has waived its immunity pursuant to O.C.G.A. § 33-24-51. That Code section provides, in part, that:

> The sovereign immunity of local government entities for a loss arising out of claims for the negligent use of a covered motor vehicle is waived as provided in Code Section 36-92-2. Whenever a municipal corporation, a county, or any other political subdivision of this state shall purchase the insurance authorized by subsection (a) of this Code section to provide liability coverage for the negligence of any duly authorized officer, agent, servant, attorney, or employee in the performance of his or her official duties in an amount greater than the amount of immunity waived as in Code Section 36-92-2, its governmental immunity shall be waived to the extent of the amount of insurance so purchased. Neither the municipal corporation, county, or political subdivision of this state nor the insuring company shall plead governmental immunity as a defense; and the municipal corporation, county, or political subdivision of this state or the insuring company may make only those defenses which could be made if the insured were a private person.

O.C.G.A. 33-24-51(b). Thus, by purchasing liability insurance to cover the negligence of county employees arising from the use of a motor vehicle, a county waives sovereign immunity pursuant to O.C.G.A. § 33-24-51(b), but only to

the extent of the amount of insurance. *See Woodard v. Laurens County*, 265 Ga. 404, 406 (1995).[12]

Here, it is undisputed that Coweta County maintains insurance to cover it and its employees for any state tort liability arising from the use of county vehicles driven by its sheriff's deputies. It is also undisputed that the vehicle driven by Scott was owned by Coweta County and was covered by the County's insurance. It is clear to the Court that, pursuant to O.C.G.A. § 33-24-61(b), Coweta County has waived sovereign immunity with respect to Plaintiff's negligence claims against Defendants Scott and Fenninger.

Defendants next argue that even if there is a waiver of sovereign immunity, the general negligence standard does not apply and that Plaintiff must show that the officers acted with "reckless disregard" of public safety. In support of this argument, Defendants rely upon O.C.G.A. § 40-6-6 which, among other things, governs the operation of a law enforcement vehicle when pursuing a suspected law violator. This code section gives police officers authority to proceed past a red signal or stop sign after slowing down, exceed the maximum speed limits so long as life and property are not endangered, and disregard regulations governing direction. See O.C.G.A. § 40-6-6(b). "By these provisions, the legislature intended to grant police officers and drivers of emergency vehicles exceptional rights in operating motor vehicles, but also to protect travelers from

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[12] Plaintiff asserts that sovereign immunity is waived not only for the negligent acts of county employees, but also for the intentional torts of those employees, but he has provided no authority for this position. Accordingly, Defendants' motion for summary judgment on all state law claims other than negligence against the County is GRANTED.

an officer's or driver's reckless disregard of the public's safety on the highways." *Cameron v. Lang*, 274 Ga. 122, 127-28 (2001). The code section also specifically addresses police pursuits:

> When a law enforcement officer in a law enforcement vehicle is pursuing a fleeing suspect in another vehicle and the fleeing suspect damages any property or injures or kills any person during the pursuit, ***the law enforcement officer's pursuit*** shall not be the proximate cause or a contributing proximate cause of the damage, injury, or death caused by the fleeing suspect unless the law enforcement officer acted with ***reckless disregard for proper law enforcement procedures in the officer's decision to initiate or continue the pursuit.*** Where such reckless disregard exists, the pursuit may be found to constitute a proximate cause of the damage, injury, or death caused by the fleeing suspect, but the existence of such reckless disregard shall not in and of itself establish causation.

O.C.G.A. § 40-6-6(c)(2) (emphasis supplied).

Plaintiff responds, and the Court agrees, that this statute is inapplicable to the present case. The statute specifically provides that "the law enforcement officer's pursuit" shall not be the proximate cause of an injury unless the officer acts with reckless disregard. Here, Plaintiff's negligence claim is not based on the officers' decision to initiate and pursue the chase; rather, it is based on the officers' decisions to ram Plaintiff's vehicle. Moreover, section § 40-6-6(b) provides law enforcement officers with specific "exceptional rights," and the right to ram another car is not listed as one of those rights.

As stated previously, Defendants do not dispute that Plaintiff has made out a prima facie case of negligence. The Court concludes that Plaintiff has provided sufficient evidence to make out a prima facie case of negligence against Scott for ramming Plaintiff's vehicle at high speeds on a two-lane road without any training and against Fenninger for authorizing Scott's allegedly negligent use of his county vehicle without first obtaining the information necessary to evaluate the situation and make a proper decision. Accordingly, Defendants' motion for summary judgment on the negligence claim against Coweta County is DENIED.

CONCLUSION

Defendants' motion for summary judgment [36] is GRANTED IN PART and DENIED IN PART. After this ruling, the following claims remain pending: Fourth Amendment claim against Defendants Scott and Fenninger in their individual capacities; municipal liability claim for failure to train against Coweta County; and negligence claim against Coweta County based on the acts of Defendants Scott and Feininger. All other claims are hereby dismissed.

Defendants' motion to amend their answer [65] is GRANTED AS UNOPPOSED.

It is so ORDERED this 25 day of September, 2003.

/s/ Willis B. Hunt, Jr.
Willis B. Hunt, Jr.
Judge, United States
District Court

433 F.3d 807

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15094

D. C. Docket No. 01-00148-CV-WBH-3

VICTOR HARRIS,

Plaintiff-Appellee,

versus

COWETA COUNTY, GEORGIA, et al.,

Defendants,

MARK FENNINGER, Sgt.,
TIMOTHY C. SCOTT, Deputy,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed December 23, 2005)

ON PETITION FOR REHEARING

Before BIRCH, BARKETT and COX, Circuit Judges.

BARKETT, Circuit Judge:

We *sua sponte* grant rehearing in this case, vacating our prior opinion, 406 F.3d 1307 (11th Cir. 2005), in its entirety and substituting the following in its place.

Coweta County Deputy Timothy Scott ("Scott") and Coweta County Sergeant Mark Fenninger ("Fenninger") appeal from the denial of summary judgment on their claims of qualified immunity on Victor Harris' ("Harris") 42 U.S.C. § 1983 action based on Harris' allegations that Scott violated his Fourth Amendment rights by using excessive force during a high-speed car chase, and that Fenninger violated his Fourth Amendment rights by authorizing that use of force.

I. BACKGROUND

Viewed in the light most favorable to the non-movant, Harris, the facts pertaining to the chase that covered approximately nine miles and lasted approximately six minutes are as follows. Between 10:30 and 11:00 pm on March 29, 2001, a Coweta County deputy clocked Harris' vehicle at 73 miles per hour in a 55 mile-per-hour zone. The vehicle that Harris was driving was registered in Harris' name and at his proper address. Although the deputy flashed his blue lights, Harris continued driving. The deputy pursued, and in attempting to flee, Harris drove in excess of the speed limit, at speeds between 70 and 90 miles per hour, passed vehicles on double yellow traffic control lanes, and ran through two red lights. Harris stayed in control of his vehicle, utilizing his blinkers while passing or making turning movements.

After Harris refused to stop, the deputy radioed dispatch and reported that he was pursuing a fleeing vehicle, and broadcast its license plate number. He did not relay that the underlying charge was speeding. Scott heard the radio communication and joined the pursuit, as it proceeded toward the county line into Fayette County, Georgia.

After crossing into Peachtree City in Fayette County, Harris slowed down, activated his blinker, and turned into a drugstore parking lot located in a shopping complex, where two Peachtree City police vehicles were already stationed. Scott proceeded around the opposite side of the complex in an attempt to prevent Harris from leaving the parking lot and getting onto Highway 74, driving his vehicle directly into Harris' path. Harris attempted to turn to the left to avoid hitting Scott's car, but the two vehicles came into contact with each other, causing minor damage to Scott's cruiser.[1] Harris then entered Highway 74 and continued to flee southward at a high speed.

Through Peachtree City, Scott took over as the lead vehicle in the chase. After getting on Highway 74, Scott radioed a general request for "Permission to PIT him." A "PIT" ("Precision Intervention Technique") maneuver is a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a *specific* point on the vehicle, which throws the car into a spin and brings it to a stop.[2] Harris' expert's report attests that "national law

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[1] Scott disputes this version of events. For purposes of summary judgment, we accept Harris' version.

[2] At the time of the chase, the Coweta County Sheriff's Department had a vehicle pursuit policy, which stated that "[d]eliberate physical contact between vehicles at anytime may be justified to

(Continued on following page)

enforcement standards require than [sic] an officer be trained in all deadly force applications before being permitted to use those applications." R. 24, at 9-10. Scott had not been trained in executing this maneuver. He and the other Coweta officers did not undergo a training on PITs until *after* the incident.

Fenninger was the supervisor who responded to Scott's radio call and granted Scott permission to employ the PIT, telling him to: "Go ahead and take him out. Take him out." Fenninger – who tuned into the transmissions about the pursuit late – did not know how the pursuit originated, the speeds of the vehicles, the numbers of motorists or pedestrians on the roadways, or how dangerously Harris was driving. Fenninger also did not request further details about the pursuit prior to authorizing the PIT.

After receiving approval, Scott determined that he could not perform the PIT maneuver because he was going too fast. Instead, however, he rammed his cruiser directly into Harris' vehicle, causing Harris to lose control, leave the roadway, run down an embankment, and crash. As a result, Harris was rendered a quadriplegic.

II. STANDARD OF REVIEW

We review the denial of summary judgment *de novo*. *Cagle v. Sutherland*, 334 F.3d 980, 985 (11th Cir. 2003). In conducting our review, we apply the same legal standards as the district court. *Vaughan v. Cox*, 343 F.3d 1323, 1328 (11th Cir. 2003). Thus, we view the facts in the light most

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terminate the pursuit upon the approval of the supervisor." R. 48, Ex. 11, at 93.

favorable to the non-moving party, and draw all reasonable inferences in his favor. *Id.* Summary judgment is not appropriate unless the evidence demonstrates that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

A defendant's entitlement to qualified immunity is a question of law, also to be reviewed *de novo*. *Cagle*, 334 F.3d at 985.

III. DISCUSSION[3]

As we have often stated, "[q]ualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Lee v. Ferraro*, 284 F.3d 1188, 1193-94 (11th Cir. 2002) (internal citations and quotation marks omitted). This immunity "allow[s] government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation[.]" *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). Thus, in order to receive its protections, the government official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Kesinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004) (citing *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002)). In this case, there is no dispute that

[3] We reject Harris' first argument that we are without jurisdiction over this interlocutory appeal. This appeal goes beyond the evidentiary sufficiency of the district court's decision.

when Scott rammed Harris' vehicle during the high-speed pursuit on March 29, 2001, he did so as part of his discretionary functions as deputy of the Coweta County Sheriff's Department (CCSD). It is likewise clear (and uncontested) that Fenninger's authorization of Scott's use of a PIT maneuver was a decision made in his capacity as supervisor to Scott and sergeant of the CCSD.

The defendants having established their eligibility for qualified immunity, the burden then shifts to the plaintiff to show that qualified immunity is not appropriate. *Lee*, 284 F.3d at 1194. This next step consists of a two-part inquiry, set forth in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). First we ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Id.* If, assuming the plaintiff's allegations were true, no such right would have been violated, the analysis is complete. However, if a constitutional violation can be made out on the plaintiff's facts, we then must determine "whether, at the time of the incident, every objectively reasonable police officer would have realized the acts violated already clearly established federal law." *Garrett v. Athens-Clarke County*, 378 F.3d 1274, 1278-79 (11th Cir. 2004) (citing *Saucier*, 533 U.S. at 201-02, 121 S.Ct. 2151). We address these questions in turn.

A. *Did Scott and Fenninger Violate Harris' Constitutional Right To Be Free From An Unreasonable Seizure?*

Harris alleges that Scott violated his Fourth Amendment right to be "free from the use of excessive force in the course of an investigatory stop or other 'seizure' of the

person." *Kesinger*, 381 F.3d at 1248 (citing *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)). To establish an excessive force claim, Harris must show first that he was subjected to a "seizure" within the meaning of the Fourth Amendment. *Vaughan*, 343 F.3d at 1328.

The district court concluded, and Scott does not contest, that Harris was seized by Scott when the latter rammed his vehicle, causing him to lose control and crash. Pursuant to *Brower v. County of Inyo*, 489 U.S. 593, 596-99, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), using a vehicle to stop and apprehend a suspect is a seizure. In *Brower*, the Supreme Court held that a fleeing suspect who fatally crashed into a so-called "deadman" roadblock[4] during a high-speed chase had been "seized" by the police who set up the roadblock.[5] The Court defined a seizure as "a

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[4] A deadman or "blind" roadblock is an obstacle (usually a police car or truck) placed on the road in a manner that prevents an oncoming driver who is being pursued by the police from knowing the road is blocked.

[5] This court held in *Adams v. St. Lucie County Sheriff's Dept.*, 998 F.2d 923, 923 (11th Cir. 1993) (*en banc*) that as of 1985 it was not "clearly established" that striking a car during a police chase constituted a seizure. That case was decided before *Saucier* and did not decide the first question which must be answered in a qualified immunity case pursuant to *Saucier*: whether a constitutional right had been violated. *See Adams*, 962 F.2d at 1577-78 ("To resolve the question of qualified immunity, we need not decide today whether the Fourth Amendment was violated."). In addition, the question in *Adams* – whether the striking of a car during a police chase constituted a seizure – has been unequivocally answered in the affirmative by the Supreme Court in *Brower*. *See Brower*, 109 S.Ct. at 1381. Moreover, the fact that striking the car during the police chase constituted a seizure is not in dispute in this case, as the officer who rammed Harris does not, and could not under the circumstances of this case, contest that he seized Harris.

governmental termination of freedom of movement through means intentionally applied." *Brower*, 489 U.S. at 597, 109 S.Ct. 1378 (emphasis omitted). The Court reasoned that "it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result . . . Brower was meant to be stopped by the physical obstacle of the roadblock – and . . . was so stopped." *Id.* at 599, 109 S.Ct. 1378. The Court noted that if "the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then the termination of the suspect's freedom of movement would have been a seizure." *Id.* at 597, 109 S.Ct. 1378. *See also Hernandez v. Jarman*, 340 F.3d 617, 623 (8th Cir. 2003) ("As we have held, a Fourth Amendment seizure occurs as a result of a car collision only where the police officer intended the collision to be the result."); *Donovan v. City of Milwaukee*, 17 F.3d 944, 949 (7th Cir. 1994) (finding a Fourth Amendment "seizure" where officer intentionally backed up squad car into the path of a fleeing motorcycle and provoked collision, sending both driver and passenger airborne).

Having determined that Harris was seized, we turn to the question of whether the force used by Scott to effectuate the seizure was reasonable, in light of the facts according to Harris.[6] In *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), the Supreme Court made

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[6] In applying the test, we must take "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396-97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). The reasonableness inquiry is an objective one: "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397, 109 S.Ct. 1865.

clear that the reasonableness of a seizure "depends on not only when a seizure is made, but also how it is carried out." In *Garner*, as in this case, the Court considered a suit for damages under 42 U.S.C. § 1983 on the grounds that the manner of the seizure violated Garner's constitutional rights. The police argued that because Garner was a fleeing felon, *any* force necessary to capture him was permissible. The Supreme Court held that the use of deadly force may not be used to seize a fleeing felon "unless it is necessary to prevent the escape *and* the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 3, 105 S.Ct. 1694 (emphasis supplied). The Court concluded that:

> [t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Id. at 11, 105 S.Ct. 1694.

The Court recognized that limited circumstances might justify the use of deadly force, to wit: (1) "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others," or "if the suspect threatens the officer

with a weapon or there is probable cause to believe that he had committed a crime involving the infliction or threatened infliction of serious physical harm," *and* (2) if deadly force is "necessary to prevent escape," *and*, (3) "if, where feasible, some warning has been given." *Id.* 471 U.S. at 11-12, 105 S.Ct. 1694. *See also Vaughan*, 343 F.3d at 1329-30. Without meeting all of these conditions, the use of deadly force is constitutionally unreasonable.

"Deadly force" is force that creates "a substantial risk of causing death or serious bodily injury." *Pruitt v. City of Montgomery*, 771 F.2d 1475, 1479 n. 10 (11th Cir. 1985) (citing Model Penal Code (MPC) § 3.11(2) (1962)).[7] The Coweta County Sheriff Department's Use of Force Policy provides an analogous definition – "[f]orce which, under the circumstances in which it is used, is readily capable of causing death or other serious injury." R. 48 at Ex. 12, at 82. In *Pruitt*, we found that shooting a suspect in the legs to stop him was a "use of deadly force" in the constitutional sense, even though the officer did not necessarily shoot to kill. We reasoned that the MPC and Alabama Code definitions of deadly force "clearly encompass[ed]" the force used in that case because "[the officer], at the least, purposely fired his shots at Pruitt's legs, and in doing so used force capable of causing serious physical injury." 771 F.2d at 1479 n. 10.

Like other instrumentalities, the use of an automobile cannot be construed in every circumstance as deadly force. However, an automobile, like a gun, can be used deliberately

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[7] In *Pruitt* we also looked to the Alabama Code, which defined "deadly force" as "[f]orce which, under the circumstances in which it is used, is readily capable of causing death or serious physical injury." 771 F.2d at 1479 n. 10.

to cause death or serious bodily injury. *See Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (suspect "used the automobile in a manner to give reasonable policemen probable cause to believe that it had become a deadly weapon with which [suspect] was armed"); *United States v. Gualdado*, 794 F.2d 1533, 1535 (11th Cir. 1986) ("Almost any object which as used or attempted to be used may endanger life or inflict great bodily harm, or which is likely to produce death or great bodily injury, can in some circumstances be a 'dangerous weapon.' . . . An automobile has been held to constitute a deadly weapon when used to run down a law enforcement officer. Likewise, in this instance appellants' boat, used in an attempt to ram the vessel of Customs officials, also could properly be considered a deadly weapon.") (internal citations omitted). *See also Hernandez*, 340 F.3d at 624 (officer had probable cause to shoot suspect where suspect "posed an imminent threat of serious physical harm to himself and to others as evidenced by [suspect's] driving head-on into [the officer's] vehicle"); *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (an attempt to hit an individual (not in a vehicle) with a moving squad car "is an attempt to apprehend by use of deadly force"); *Donovan*, 17 F.3d at 949-50 (backing up of a squad car into path of a fleeing motorcycle was an application of deadly force); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (citing *United States v. Sanchez*, 914 F.2d 1355 (9th Cir. 1990)) ("even unarmed, [the plaintiff] was not harmless; a car can be a deadly weapon."). *Cf. Browér v. County of Inyo*, 884 F.2d 1316, 1317-18 (9th Cir. 1989) (assuming without deciding that deadman roadblock to stop a fleeing vehicle during a high-speed chase was an application of "deadly force" and applying *Garner* analysis).

Under an objective view of the facts of this case, there is little dispute that the ramming of Harris' car could constitute a use of "deadly force" and that a jury could so reasonably conclude.[8] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) ("The judge's inquiry [at the summary judgment stage], therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict."). Moreover, none of the limited circumstances identified in *Garner* that might render this use of deadly force constitutional are present here. Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others.

None of the antecedent conditions for the use of deadly force existed in this case. Harris' infraction was speeding (73 mph in a 55 mph zone). There were no warrants out for his arrest for anything, much less for the requisite "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11-12, 105 S.Ct. 1694. Indeed, neither Scott nor Fenninger had any idea why Harris was being pursued. The use of

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[8] *See also* Scott's Depo., R. 48 at 157-58 (testifying that ramming Harris' vehicle at high speeds constituted a use of deadly force under the CCSD Deadly Force Policy); Fenninger's Depo., R. 50 at 62-63 (testifying that he gave authorization to make contact with the understanding that he was authorizing the use of deadly force). *See also* testimony of other Coweta County and Peachtree City officers stating that they considered that ramming a vehicle at 90 mph could constitute a use of "deadly force." Reynold's Depo., R.49 at 118-119; Yeager's Depo., R. 54 at 59; Kinsey's Depo., R. 51 at 44; Ercole's Depo., R. 47 at 37-40.

deadly force is not "reasonable" in a high-speed chase based only on a speeding violation and traffic infractions where there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle, and there is no question that there were alternatives for a later arrest. *Vaughan*, 343 F.3d at 1330. The *Garner* Court specifically recognized that it would be an anomaly to transform "every fleeing misdemeanant into a fleeing felon . . . solely by virtue of his flight." 471 U.S. at 10 n. 9, 105 S.Ct. 1694.[9] A high-speed chase of a suspect fleeing after a traffic infraction does not amount to the "substantial threat" of imminent physical harm that *Garner* requires before deadly force can be used. *Garner* made clear that "[i]t is not better that all . . . suspects die than that they escape." 471 U.S. at 11, 105 S.Ct. 1694.[10]

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[9] As recognized in *Vaughan*:

> Under *Garner*, a police officer can use deadly force to prevent the escape of a fleeing non-violent felony suspect only when the suspect poses an immediate threat of serious harm to police officers or others. In this case, the danger presented by [the suspects'] continued flight was the risk of an accident during the pursuit. Applying *Garner* in a common-sense way, a reasonable officer would have known that [ramming a car when both automobiles were] traveling at approximately 80 miles per hour . . . would transform the risk of an accident on the highway into a virtual certainty.

343 F.3d at 1332-33.

[10] We recognize that whether or not Harris would have escaped has no bearing on the excessive force analysis, as *Garner* specifically based its holding on the assumption that a fleeing suspect *would* escape. 471 U.S. at 11, 105 S.Ct. 1694. We note, however, as did the district court, that there were other means to track Harris down as the pursuing officers had a description of the vehicle as well as the license plate number. We also note that absolutely no warning was given that Scott intended to use deadly force.

We reject the defendants' argument that Harris' driving must, as a matter of law, be considered sufficiently reckless to give Scott probable cause to believe that he posed a substantial threat of imminent physical harm to motorists and pedestrians. This is a disputed issue to be resolved by a jury. As noted by the district court judge, taking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. *Cf. Pace*, 283 F.3d at 1282 (officer had probable cause to believe that car had become a deadly weapon with which defendant was armed where suspect drove through residential neighborhood at 50 to 60 mph, swerved at oncoming police cars, nearly hit elderly motorist head-on when driving on wrong side of road, and accelerated towards police car roadblock forcing officer off of the road to avoid collision); *Cole v. Bone*, 993 F.2d 1328, 1331-34 (8th Cir. 1993) (deadly force was reasonable to stop high-speed chase where truck forced more than one hundred cars off the road or out of the truck's way and endangered the lives of many other motorists during the pursuit, chase lasted 50 miles, and officers attempted to slow the vehicle using several types of roadblocks). Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.[11]

[11] Nor does the evidence show that Scott or the other officers were in immediate danger or threatened with imminent harm. Accepting

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Nor can we countenance the argument that by continuing to flee, a suspect absolves a pursuing police officer of any possible liability for all ensuing actions during the chase. The Supreme Court rejected such an argument in *Brower*, where it was suggested that the plaintiff in that case "had a number of opportunities to stop his automobile prior to the impact" and thus, could have avoided his own injuries. *Brower*, 109 S.Ct. at 1380-81 (citation omitted). Justice Scalia noted that essentially the same thing could have been said about the suspect in *Garner*, that is, the plaintiff's "independent decision to continue the chase can no more eliminate respondents' responsibility for the termination of his movement effected by the roadblock than Garner's independent decision to flee eliminated the Memphis police officer's responsibility for the termination of his movement effected by the bullet." *Id.* at 1381.

We conclude that ramming Harris' vehicle under the facts alleged here, if believed by a jury, would violate Harris' constitutional right to be free from excessive force during a seizure. Accordingly, a reasonable jury could find that Scott violated Harris' Fourth Amendment rights.

Harris' version of events, Harris did not attempt to ram, run over, sideswipe, or swerve into any of the officers (which might have put their lives in danger in the parking lot), nor did he attempt any such conduct once he was back on the highway immediately before the seizure. *Cf. Hernandez*, 340 F.3d at 623 (evidence of plaintiff's attempts to intentionally drive his car directly into officer's vehicle supported finding that officer's use of deadly force was reasonable); *Smith*, 954 F.2d at 347 (use of deadly force not unreasonable where suspect "posed a major threat" to officers manning roadblock by driving directly into them on a residential dead-end street and "had proven he would do almost anything to avoid capture").

With respect to Fenninger, however, we cannot come to the same conclusion. Although the use of deadly force cannot be authorized under *Garner* without knowing that the *Garner* conditions have been met, the facts of this case do not establish that Fenninger authorized deadly force. Rather, the evidence shows that Fenninger authorized a PIT – defined by the district court as "a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop." This definition assumes that the maneuver will be executed at lower speeds by properly trained officers, and therefore can terminate a flight "safely." *See, e.g.*, Geoffrey Alpert's Expert Report, R. 24 at 5 (stating that the PIT requires a set of defined circumstances in order for it to be performed safely (i.e., at low speeds on wide straightaways, on dry pavement by a properly trained driver)); National Law Enforcement and Corrections Technology Center Bulletin, U.S. Department of Justice, October 1996, at 4-5 (stating that the PIT "is not applicable in every situation, the key to its effective use is to carefully choose a favorable spot before attempting PIT and to first consider the possible effects on other traffic and pedestrians"); National San Diego Police Department Use of Force Task Force Recommendations, Executive Summary at 37 ("Utilized at speeds of 35 mph or less, the PIT maneuver improves officer and public safety by removing the threat of pursuit as quickly and safely as possible."). Scott, however, chose not to execute a PIT at all, but rather to ram the car at a very high speed from behind. Because this ramming was not authorized by Fenninger, we cannot say that Fenninger's conduct-authorization of a safe PIT that was not executed – violated Harris' constitutional rights. Thus, since Fenninger is not liable for a constitutional

violation, summary judgment should be granted in his favor. The district court's ruling as to Fenninger is therefore reversed.

B. Is Scott entitled to qualified immunity?

Having determined that a jury could have reasonably found the violation of a constitutional right by Scott, we now ask whether the law as it existed on March 29, 2001, was sufficiently clear to give reasonable law enforcement officers "fair notice" that ramming a vehicle under these circumstances was unlawful. *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002); *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). "The essence of qualified immunity is notice." *Holmes v. Kucynda*, 321 F.3d 1069, 1077 (11th Cir. 2003) (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)).

For at least twenty years, since *Garner* was decided, officers have been on notice that they may not use *deadly force* to seize a fleeing suspect unless the suspect poses a significant threat of death or serious physical injury. *See Garner*, 471 U.S. at 11-12; *see also Garner*, 471 U.S. at 10-11 ("[t]he fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects."). Moreover, prior to the incident in question the law was clearly established that an automobile, like a gun, could be used as a deadly instrument. *See also Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir. 2002) (concluding that fleeing felon in 1998 had used car in a way that made it a "deadly weapon"); *United States v. Gualdado*, 794 F.2d 1533, 1535 (11th Cir. 1986) ("Almost any object which as used or attempted to be used may endanger life or inflict great bodily harm, or which is

likely to produce death or great bodily injury, can in some circumstances be a 'dangerous weapon' concluding that appellants' boat, used in an attempt to ram the vessel of Customs officials, [could] . . . properly be considered a deadly weapon.") (internal citations omitted).[12]

It was also clearly established at the time of the instant circumstances that the Fourth Amendment requires a seizure of a fleeing suspect to be reasonable and that deadly force cannot be employed in a situation that requires less-than-lethal force. *Garner*, 471 U.S. at 8, 11-12 (holding that "[t]he use of deadly force to prevent the escape of all *felony* suspects, whatever the circumstances, is constitutionally unreasonable. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead"; "it is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out") (emphasis added); *Brower v. County of Inyo*, 109 S.Ct. 1378, 1381 (1989). *See Terry v. Ohio*, 392 U.S. 1, 19-20 (1968) (requiring reasonableness of seizure based on the circumstances, including scope and intensity of seizure); *United States v. Ortiz*, 422 U.S. 891, 895 (1975) (same); *Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997) (holding Fourth Amendment violated if seizure occurred and force used to effect the seizure was unreasonable); *see generally Mercado v. City of Orlando*, 407

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[12] *See also Hawkins v. City of Farmington*, 189 F.3d 695, 703 (8th Cir. 1999); *Ludwig*, 54 F.3d at 473 (an attempt to hit an individual (not in a vehicle) with a moving squad car "is an attempt to apprehend by use of deadly force"); *Donovan*, 17 F.3d at 949-50 (backing up of a squad car into path of a fleeing motorcycle was an application of deadly force); *Sturges v. Matthews*, 53 F.3d 659, 661 n. 1 (4th Cir. 1995); *Smith*, 954 F.2d at 347 (citing *Sanchez*, 914 F.2d 1355) ("even unarmed, [the plaintiff] was not harmless; a car can be a deadly weapon.").

F.3d 1152, 1160 (11th Cir. 2005) (holding that in 2002 there was a "clearly established principle that deadly force cannot be used in non-deadly situations.").[13]

Impacting our review of reasonableness is a "careful attention to the facts and circumstances of each particular case, *including the severity of the crime at issue.*" *Graham*, 490 U.S. at 396 (emphasis added); *Lee v. Ferraro*, 284 F.3d 1188, 1197-98 (11th Cir. 2002) (denying qualified immunity to officer on excessive force claim partially because of low level of plaintiff's offense; "*Graham* dictates unambiguously that the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force, which is measured by the severity of the crime. . . . "); *Jackson v. Sauls*, 206 F.3d 1156, 1170 n. 18 (11th Cir. 2000) ("A court may also factor in 'the severity of the crime. . . . '") (quoting *Gold v. City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 1997); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1559 (11th Cir. 1993) (same); *see generally United States v. Kaplan*, 286 F. 963, 974 (D.C. Ga. 1923) (holding that "in the case of a misdemeanor, the general rule that an officer has no right, except in self-defense, to kill the offender to effect his arrest, and that the 'killing of a fleeing person under such circumstances would amount to murder.'"); *King v. State*, 91 Ga. App. 825, 828 (Ga. App. 1955) ("no arresting officer has any

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[13] To determine the constitutionality of a seizure "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Graham*, 490 U.S. at 8 (citing *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976)).

right to kill a person for trying to escape in the commission of a misdemeanor").

Thus, by 2001 the law was clearly established that a seizure must be reasonable under the circumstances, which include a review of the offense charged; that an automobile can be used as deadly force; and that deadly force cannot be used in the absence of the *Garner* preconditions.

The establishment of these principles distinguishes this case from *Brosseau v. Haugen*. In *Brosseau*, the Supreme Court reversed the denial of qualified immunity to an officer sued for Fourth Amendment violations under § 1983 for shooting a suspected felon as he attempted to flee in a vehicle, where the officer had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area.[14] Unlike Harris, Haugen,

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[14] These facts are not comparable to those in *Harris*. In the light most favorable to Harris, there is no comparable evidence that Scott had arguable probable cause to believe that Harris posed an *immediate* risk of death or serious danger to Scott, other officers, or nearby citizens. Harris was being chased for a traffic violation, not a "crime involving the infliction or threatened infliction of serious physical harm." *Garner*, 471 U.S. at 11, 105 S.Ct. 1694. Unlike the situation in *Brosseau*, the parties were not in close physical proximity nor had they had a one-on-one struggle. In fact, Scott and the other pursuing officers were following Harris from *behind in their squad cars*. At the time of the ramming, apart from speeding and running two red lights, Harris was driving in a non-aggressive fashion (i.e., without trying to ram or run into the officers). Moreover, unlike Haugen, who was surrounded by officers on foot, with other cars in very close proximity in a *residential* neighborhood, Scott's path on the open highway was largely clear. The videos introduced into evidence show little to no vehicular (or pedestrian) traffic, allegedly because of the late hour and the police blockade

(Continued on following page)

the suspect in *Brosseau*, was a suspected felon with a no-bail warrant out for his arrest, with whom Brosseau, the officer, had a violent physical encounter prior to the shooting. Believing that Haugen had entered a Jeep to retrieve a gun, Brosseau broke the windowpane of the Jeep, and attempted to stop Haugen by hitting him over the head with the butt and barrel of her gun. Haugen was undeterred, however, and began to take off out of the driveway, without regard for the safety of those in his immediate vicinity – the three officers on foot (Haugen at his immediate left and two others with a K-9 somewhere nearby), a woman and her 3-year-old child in a small vehicle parked directly in front of the Jeep and 4 feet away, and two men in a parked vehicle 20 to 30 feet away. In addition, prior to shooting, Brosseau warned Haugen that she would shoot by pointing her gun at the suspect while commanding him to get out of the car, and then using the gun to shatter the glass of the car window and hit Haugen in an attempt to get the keys.

Looking to *Garner*, the *Brosseau* Court recognized that its clearly established deadly force rule (i.e., that "it is unreasonable for an officer to 'seize an unarmed non dangerous suspect by shooting him dead' ") was limited by the Court's further instruction that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Brosseau*, 125 S.Ct. at 598 (quoting *Garner*, 471 U.S. at 11, 105 S.Ct. 1694. Thus, the *Brosseau* Court held that *Garner* did not provide a reasonable

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of the nearby intersections. Finally, Scott issued absolutely no warning (e.g., over the loudspeaker or otherwise) prior to using deadly force.

officer with fair notice of a Fourth Amendment violation in "the situation [Brosseau] confronted: whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, *when persons in the immediate area are at risk from that flight.*" *Id.* at 600 (emphasis supplied).[15]

Scott also argues that *Garner* does not apply because in that case, the officer applied the deadly force with a gun. Scott relies on our holding in *Adams* that in 1985, the caselaw was insufficiently developed to give notice to every objectively reasonable officer that a police car ramming another car during a high-speed pursuit would constitute

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[15] We also note that the Court in *Brosseau* acknowledged that the standard in *Garner can* "clearly establish" whether or not the use of deadly force is unconstitutional in an "obvious case." *Brower,* 489 U.S. at 599; *United States v. Lanier,* 520 U.S. 259, 271, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) ("general constitutional rule already identified in the decisional law . . . appl[ied] with obvious clarity to [his conduct]."). It is well-established that "general statements of the law" are perfectly capable of giving clear and fair warning to officers even where " 'the very action in question has [not] previously been held unlawful.' " *Lanier,* 520 U.S. at 271 (quoting *Anderson,* 483 U.S. at 640, 107 S.Ct. 3034); *Vinyard,* 311 F.3d at 1350-51. While we need not conclude that the facts in *Harris* present just such an "obvious" case to deny Scott qualified immunity, this case may present such circumstances, since the evidence shows that Scott lacked the sufficient probable cause to warrant the use of deadly force. In this way, *Harris* is more like *Vaughan* than *Brosseau* or the cases cited therein. *See Vaughan,* 343 F.3d at 1333 ("appl[ying] *Garner* in a common-sense way" to hold that a reasonable officer would have known that it was unconstitutional to use deadly force during a high-speed pursuit *where the suspect posed no immediate threat of harm to police officers or others*). In the cases relied upon in *Brosseau,* the officer had arguable probable cause to believe that the suspects presented an immediate risk of danger to the officers or others. *See Brosseau,* 125 S.Ct. at 600 (citing *Cole v. Bone,* 993 F.2d 1328 (8th Cir. 1993) and *Smith,* 954 F.2d 343). Without the existence of an immediate threat of harm to the officers or others that could justify the officer's probable cause, the *Garner* rule prohibiting deadly force may apply with "obvious clarity."

an unreasonable seizure. However, the facts in *Adams* occurred before *Brower* was decided, and thus, at a time before the Supreme Court made clear that the intentional use of a vehicle to apprehend a suspect was a Fourth Amendment seizure. That principle is now settled. *Garner* made clear that the use of deadly force against an unarmed and nondangerous fleeing felony suspect was unlawful and set out the specific criteria necessary before the application of deadly force is warranted. This law clearly applied to the use of a vehicle to seize a suspect at the time of the incident in this case.

We are satisfied that, under *Hope*, the requirement that the officers have "fair warning" that their conduct violates a constitutional right through a general constitutional rule, "even though the very action in question has [not] previously been held unlawful," has been satisfied. 536 U.S. at 740-41, 122 S.Ct. 2508 (internal quotation marks and citations omitted). A reasonable police officer would have known in 2001 that a vehicle could be used to apply deadly force,[16] could be used to effectuate a seizure,[17] and that deadly force could not be used to apprehend a fleeing suspect unless the conditions set out in *Garner* existed. *Garner*, 471 U.S. at 11-12, 105 S.Ct. 1694. *See also Vaughan*, 343 F.3d at 1329-30. The *Garner* Court used the term "deadly force," not "handgun," in enunciating its rule. *Garner*, 471 U.S. at 11-12, 105 S.Ct. 1694 ("Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious

[16] *See* citations on pages, *supra*.

[17] *Brower*, 489 U.S. at 596-99, 109 S.Ct. 1378.

physical harm, *deadly force* may be used . . . ") (emphasis supplied). Moreover, the opinion recognizes the obvious principle that "deadly force" can be inflicted through other means. *Id.* at 14, 105 S.Ct. 1694 (observing that in times when weapons were rudimentary, "[d]eadly force could be inflicted almost solely in a hand-to-hand struggle . . . "). *See Vaughan*, 343 F.3d at 1332 ("the Supreme Court in *Hope* cautioned that we should not be unduly rigid in requiring factual similarity between prior cases and the case under consideration"). *See also Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998) (applying *Garner* "deadly force" rule to determine whether officers were qualifiedly immune for hog-tying suspect).

By 2001, it was well-established in this circuit that "deadly force" means force that creates a substantial risk of causing death or serious bodily injury. *Pruitt*, 771 F.2d at 1479 n. 10. The CCSD policy in 2001 employed a near-identical definition. Moreover, by 1986, we had recognized the potentially lethal nature of an automobile. *See Gualdado*, 794 F.2d at 1535, and other cases cited on pages ___, *supra*.

We are also satisfied that common sense would inform any reasonable officer that there would be substantial risks of death or bodily harm if he used his vehicle to ram another vehicle at high speeds in the manner employed in this case. *See* CCSD Use of Force Policy, R. 48, Ex. 12 at 82 (restricting the use of deadly force to "[w]hen the Deputy reasonably believes it is necessary to defend their [sic] own life or the life of another or to prevent grave bodily injury to themselves [sic] or another, and all other available means of defense have failed or would be inadequate or dangerous," or "[w]hen necessary to prevent the commission of . . . any felony which involves the use or threat of

physical force or violence against any person."). *See also* Ga.Code Ann., § 17-4-20(b) ("Sheriffs and peace officers . . . may use deadly force to apprehend a suspected felon only when the officer reasonably believes that the suspect possesses a deadly weapon or any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury; when the officer reasonably believes that the suspect poses an immediate threat of physical violence to the officer or others; or when there is probable cause to believe that the suspect has committed a crime involving the infliction or threatened infliction of serious physical harm."); *Garner*, 471 U.S. at 10-11, 105 S.Ct. 1694 ("The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects."). *Cf.* CCSD Pursuit Policy, R. 48, Ex. 11, at 94 (categorizing roadway barricades as the use of deadly force and limiting their use "only by order of a supervisor and then only as a last resort when the person pursued has proven by his method of flight a total disregard for the lives and safety of the public"). *See Vaughan*, 343 F.3d at 1332-33 ("Applying *Garner* in a common-sense way, a reasonable officer would have known that firing into the cabin of a pickup truck, traveling at approximately 80 miles per hour on Interstate 85 in the morning, would transform the risk of an accident on the highway into a virtual certainty. The facts of this case bear out these foreseeable consequences. Thus, Deputy Cox is not entitled to . . . qualified immunity grounds, regarding Vaughan's § 1983 claim predicated on the Fourth Amendment.").

For the foregoing reasons, a jury could conclude that Scott unreasonably used deadly force to [illegible] Harris by ramming him off the road under the instant circumstances,

and we find no reversible error in the denial of qualified immunity to Scott at this stage in this case.[18]

Consistent with the above conclusions, the district court opinion is

REVERSED IN PART and AFFIRMED IN PART.

[18] Scott is not foreclosed from seeking to assert a qualified immunity defense at trial if the facts proven at trial differ from those we consider here for summary judgment purposes.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15094-HH

VICTOR HARRIS,

Plaintiff-Appellee,

versus

MARK FENNINGER,
Sgt.,
TIMOTHY C. SCOTT,
Deputy,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Feb. 17, 2006)

Before: BIRCH, BARKETT and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Rosemary Barkett
UNITED STATES CIRCUIT JUDGE